Supreme Court, U.S.
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CLERK

89-1554

No. _____

IN THE

Supreme Court of the United States

October Term 1990

ROBERT E. BLACKWELDER, et al.,

Petitioners,

VS.

LIFE AND HEALTH SERVICES, INC.

Respondents.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a self insurance health plan, which consists solely of state government employees and is funded primarily by contributions from state government, is a government plan within the meaning of ERISA and thus exempt from federal preemption?

II. Is a plan to provide health and disability benefits to employees of twenty-six (26) Junior Colleges throughout the State of Alabama an employee welfare plan, and thus subject to the provisions of ERISA, where such plan is not established nor maintained by an employer nor employee organization?

PARTIES

In the Supreme Court of Alabama, the parties were:

1. Robert E. Blackwelder, as representative of classes of Plaintiffs who were participants in a self insurance plan who incurred medical expenses which were not paid by the plan, and Mary R. Holley, as representative of plan members who incurred no medical bills.

2. The Defendants were Harbor Insurance Company, the reinsurer for the Plan; Life and Health Services, Inc., the plan administrator; and Robert Wilder.

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PETITION FOR WRIT OF CERTIORARI

TABLE OF STATUTORY PROVISIONS

This case involves 29 U.S.C. Section 1003 (b) and Section 1002 (32).

OPINIONS BELOW

On December 30, 1987, the Circuit Court of Montgomery County ruled that the self insurance plan in question was a government plan and thus exempt from the provisions of 29 U.S.C., Section 1001 et.seq. This ruling was made after a lengthy trial and subsequent evidentiary hearings. This order is attached hereto as Appendix A. The Defendants took an appeal from that order to the Supreme Court of Alabama which became identified as Alabama Supreme Court Case Nos. 87-391, -407 and -487.

On September 29, 1989, the Alabama Supreme Court reversed the trial court by a vote of five to four. A copy of this decision is attached as Appendix B. The Plaintiffs/Appellees filed a timely Application for Rehearing which was denied by the Alabama Supreme Court on November 17, 1989. A copy of that Order is attached as Appendix C.

JURISDICTION

The Judgment of the Alabama Supreme Court was entered on September 29, 1989. An Application for Rehearing was denied on November 17, 1989. Jurisdiction of this case is invoked pursuant to 28 U.S.C. 1257.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. Section 1003 (b) (1) provides as follows:

(b) The provisions of this title shall not apply to any employee benefit plan if -

(1) Such plan is a governmental plan (as defined in Section 3 (32) [29 U.S.C. Section 1002 (32)]; ....

29 U.S.C. Section 1002 (32) provides in pertinent part:

The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

STATEMENT OF THE CASE

In March 1983, the Defendant Life and Health Services, Inc. filed a suit against the present Plaintiffs as representatives of a class of persons who had been members of the Alabama Junior/Community Colleges and Technical Colleges Employees Benefit Plan, seeking to recover an approximate $600,000 deficit from the participants in this self insurance plan. The present Plaintiffs were realigned as plaintiffs and asserted common law causes of action against Life and Health Services, Inc., Robert E. Wilder and Harbor Insurance Company. These common law causes of action sounded in negligence, wanton negligence and fraud. The Defendants raised the defense of federal preemption of common law causes of action by 29 U.S.C. Sections 1001 et.seq., commonly known as the ERISA legislation. Plaintiffs asserted that there was no preemption as this was a "government plan" and thus exempt from the provisions of ERISA pursuant to 29 U.S.C. Section 1003 (b) (1).

On the authority of *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910, (2d Cir. 1987), cert. denied, ____ U.S. ____, S.Ct. 1112, 99 L.Ed.2d 273 (1988), *Feinstein v. Lewis*, 477 F.Supp. 1256 (SDNY. 1979) and numerous Private Opinion Letters of the United States Department of Labor, the Trial Court held that this was a "government plan" and thus allowed the common law causes of action (See Appendix A). Thereafter, the Defendants perfected an appeal to the Alabama Supreme Court.

After submission, the Alabama Supreme Court is a 5/4 decision reversed the Trial Court and held that this was not a government plan, thus disallowing the common causes of action for negligence and wanton negligence. A timely Application for Rehearing was filed by your Petitioners in the Alabama Supreme Court which was denied without opinion on November 17, 1989, hence this Petition.

ARGUMENT
REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE ALABAMA SUPREME COURT HAS RULED CONTRARY TO FEDERAL STATUTES, FEDERAL DECISIONS AND THE OPINION LETTERS OF THE UNITED STATES DEPARTMENT OF LABOR

Each junior college in Alabama operates under the Department of Post Secondary Education with each junior college having a president. The Department of Post Secondary Education is a department of the Board of Education of the State of Alabama. The State Department of Education annually appropriates money to be used for the purchase of insurance by its employees, which specified sum of money is paid directly by the State of Alabama to the group insurance carrier.

In the early 1980's, the Association of Junior College Presidents began to study a self insurance concept for the employees of the junior colleges. The Association of Junior College Presidents is composed of the president of each of Alabama's twenty-eight junior and community colleges with the presidents being appointed by the proper governmental authorities with the State of Alabama. The Presidents are responsible to the Department of Post Secondary Education and to the Department of Education of the State of Alabama. The presidents considered proposals from a number of insurance companies and plan administrators. At a meeting in the Department of Post Secondary Education, the plans were presented to the presidents of each of the colleges and to the insurance representatives of each of the colleges. The presidents and insurance representatives voted to accept the proposal presented by Life and Health Services for group insurance coverage for their employees, all of whom are employees of the State of Alabama. The

presidents and insurance representatives then held meetings at each of the junior colleges to explain to the employees the terms of the group coverage being offered to them pursuant to their employment with the State of Alabama. The State Department of Education paid virtually the entire premium or contribution for the employee and the employee had to pay for dependent coverage under the plan which was accepted by the Alabama junior and community colleges. This money did not go to the employee and went directly for insurance to the company from the State of Alabama.

Following the selection by the Alabama Junior and Community Colleges of the Life and Health Services plan, a trust was formed to administer the fund by five of the junior college presidents. The signatures on this document were made by these five individuals on behalf of the Alabama Junior and Community Colleges. Following the adoption of the plan and the formation of the trust, the five presidents as trustees were responsible for overseeing the plan and the insurance representatives of each college were responsible for helping employees with forms and resolving differences between the plan administrator and subscribers. Needless to say, the presidents are government employees who are appointed by the Board of Education and the insurance representatives are employees of the State of Alabama also.

The agency charged by law with administering ERISA is the United States Department of Labor. As such, it has been called upon from the passage of the Act to interpret its provisions. Some eighty (80) opinion letters have been issued to date setting forth its position as to what constitutes a "government plan" within 29 U.S.C. Section 1003 (b)(1). The Department took a position soon after the passage of the Act when it held that a plan is 'established or maintained' by an employer *who makes contributions to it or* is involved to a significant degree in its administration. *Public Opinion Letter* 79-36A.

Although numerous Private Opinion Letters have been written

which define a "government plan" in the view of the Department of Labor, two of these indicate graphically how little contact government has to have with an insurance plan to make it a government plan.

In Public Opinion Letter 83-24A, the Department considered the Federation of Tax Administrators pension plan. The Federation of Tax Administrators was a non profit association whose membership consisted of the revenue agencies of the fifty states and the District of Columbia. It was funded by assessments against individual State Revenue Departments, income from surplus funds and sales of its publications to the public. The Department held that in view of the substantial sponsorship and contributions by several states to the Federation of Tax Administrators or its operation, that it was a governmental plan. In Public Opinion Letter 81-82A, a similar situation was presented with respect to the National Association of Insurance Commissioners (NAIC). The NAIC is an unincorporated association whose membership consists of the Insurance Commissioners of all of the states which was in operation under its own governing body elected from among its membership. The bulk of financial support to the executive secretary's office came from assessments against the individual state insurance departments. Some states made voluntary contributions and some states had assessments for the support of the NAIC. The Department of Labor held that in view of the substantial contributions made by the several states for its operation, including its retirement plan for employees, that the retirement plan for NAIC employees would be viewed as a governmental plan. The opinion took no position as to whether NAIC constituted an agency or instrumentality of state government and hinged solely upon the fact that contributions were made by government. It is thus clear that the Department of Labor would view the plan in question as a "government plan." Thus, the plan members were deprived of any ERISA remedies and any protection offered by ERISA such as guaranty funds. The Department of Labor would not have regulated or supervised the plan in question in any respect.

Federal decisions have also addressed the question of what is a "government plan." The first decision is to be found in *Feinstein v. Lewis*, 477 F.Supp. 1256 (S.D.N.Y., 1979). All of the employees covered by that plan were government employees as in the instant case. The Court noted that Congress in debate had decided because of principles of federalism not to interfere with the right of local and state government decisions on how to protect their employees. Further, the Court noted that it was clear that Congress had in mind exempting plans which covered government employees rather than plans exclusively maintained and established by governmental bodies.

The Second Circuit considered the "governmental plan" exception in *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910 (C.A. 2, 1987) cert. den. _____ U.S. _____, 108 S.Ct. 1112, 99 L.Ed.2d 273 (1988) and quoted *Feinstein*, supra, at length with approval. The Court considered at length why Congress created an exemption for government plans. The Second Circuit found that it was partly because of principles of federalism. *Rose* concluded, as did *Feinstein*, that Congress intended to exempt plans which covered only public employees. Furthermore, *Rose* held that the term political subdivision included individuals who were responsible to public officials. Clearly the trustees of the Plan involved here, all presidents of junior colleges, were responsible to public officials, and as such constituted a political subdivision of the State of Alabama. *Rose* discussed the fact that government was not obligated to fund the plan but noted that government normally operated in that fashion. The basic thrust of the holding in *Rose* as in *Feinstein* was that if a plan only covered government employees, it constituted a "government plan" within the meaning of ERISA. More recently, in *Roy v. Teachers Insurance and Annuity Association*, 878 F.2d 47 (C.A. 2, 1989), the Second Circuit again addressed the "government plan" issue. The Court stressed the use of the conjunctive "or" between "established *or* maintained" and again held that Congress meant to exempt any plan which only covered government employees.

The Department of Labor and the Federal decisions have clearly shown that a plan is a "government plan" if it only covers governmental employees and receives any government funding at all. The ruling of the Alabama Supreme Court is clearly erroneous and produces disastrous results which will frustrate the purpose of ERISA. If Petitioners had applied to the Department of Labor for ERISA compliance, they clearly under numerous opinion letters would have been told that they were excluded and not covered by ERISA. Now, they have been told by the Alabama Supreme Court that they have no common law rights because of ERISA preemption. Petitioners are in the absolutely untenable position of having been told by Federal and State government that they have no right in Court and none by statute as provided by ERISA.

II

IS A PLAN TO PROVIDE HEALTH AND DISABILITY BENEFITS TO EMPLOYEES OF TWENTY-SIX JUNIOR COLLEGES THROUGHOUT THE STATE OF ALABAMA AN EMPLOYEE WELFARE BENEFIT PLAN, AND THUS SUBJECT TO THE PROVISIONS OF ERISA, WHERE SUCH PLAN IS NOT ESTABLISHED NOR MAINTAINED BY AN EMPLOYER NOR EMPLOYEE ORGANIZATION?

To qualify as an ERISA plan evidence must be clear that the following exists:

1. Health or other benefits must be provided;

2. Intended beneficiaries must include employees of an employer or employee organization; *and*

3. The plan must be established or maintained by an employer or employee organization.

The third requirement is not met where the plan is established

by individual employees (college presidents) or by an entrepreneurial business. (Life and Health or Harbor). *Donovan v. Dillingham*. 688 F.2d 1367 (11th). A multiple employer trust is not per se an employee welfare benefit plan. *ibid*.

Where an organization is not a bona fide employer or employee organization (as the Alabama Supreme Court has apparently ruled in our case) a state is not precluded from regulating it regardless of its efforts to provide health care benefits to employees. Thus, it is not a preempted ERISA plan. *Mathew 25 Ministries, Inc. v. Corcoran*. 771 F.2d 21 (2nd 1985).

The mere fact that an Education Association Insurance Trust maintained health and disability benefits to employees of school districts did not make it an ERISA plan since participation in the plan was not limited to member-employees of the employee trust's union. *Wisconsin Educ. Ass'n. Ins. Trust v. Iowa State Bd.*, 804 F.2d 1059 (8th 1986).

CONCLUSION

If the decision of the Alabama Supreme Court is allowed to stand, citizens of the United States of America will have been told that they have no right to redress of their grievances in any forum.

GEORGE L. BECK, JR.

C. KNOX MCLANEY, III

CERTIFICATE OF SERVICE

I, George L. Beck, Jr., a member of the Bar of the Supreme Court of the United States and attorney for the Petitioners, Robert E. Blackwelder, et al., do hereby certify that on this 15th day of Feb, 1990, I did serve the requisite number of copies of the foregoing on the attorneys for the Respondent, by mailing the same to them first-class, postage prepaid and addressed as follows:

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APPENDICES

APPENDIX A

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. CV-83-640-G

ROBERT E. BLACKWELDER, et al.,
Plaintiffs,

vs.

ALABAMA JUNIOR/COMMUNITY COLLEGES, et al.,
Defendants.

ORDER OF PENDING MOTIONS AND JUDGMENT
OF NON JURY ISSUE

It is ORDERED, as follows:

1. All post-judgment motions filed by the defendants are, Denied.

2. The court holds that the self insurance fund at issue in this case was a governmental plan as defined by ERISA, and, as such, is specifically exempted from ERISA requirements so as not to preclude the common law causes of action. Judgment is entered in favor of the plaintiff classes and against the defendants on this issue.

DONE and ORDERED in chambers this the 30th day of December, 1987.

WILLIAM R. GORDON
CIRCUIT JUDGE

cc: Clyde C. Owen, Jr.
George L. Beck
Henry C. Barnett, Jr.
C. Knox McLaney, III
Robert S. Lamar

APPENDIX B

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1989

Harbor Insurance Company

87-391, -407

v.

Robert E. Blackwelder, et al.

Life and Health Services, Inc.
and Robert Wilder

87-487

v.

Robert E. Blackwelder, et al.

Appeals from Montgomery Circuit Court
(CV-83-640-G)

JONES, JUSTICE.

These appeals are from final judgments entered upon jury verdicts in favor of two classes of plaintiffs. The plaintiffs were all participants in an insurance plan that, due to underfunding, was unable to pay its obligations and failed. Because the plan in question is not a "governmental plan," as that term is used in the Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. § 1001 et seq.), we hold that, except for their fraud claims against Life and Health Services, Inc. ("L&H"), and its president, Robert Wilder, the plaintiffs' common law claims are preempted by ERISA; therefore, the judgments against L&H and Wilder based

on fraud are affirmed; the remaining judgments against Wilder and L&H, and the judgments against Harbor Insurance Company ("Harbor") are reversed; and the cause is remanded for entry of judgments consistent with this opinion.

The facts that led to this appeal are somewhat complicated, but they can be summarized for the purposes of this opinion. In January 1980, Dr. William McWhorter, the president of one of Alabama's junior colleges, became interested in organizing a consolidated health insurance plan for all of Alabama's junior, community, and technical colleges.[1] He sent questionnaires to the presidents of the other schools to ascertain their interest in such a plan. Once the results were compiled, they were provided to L&H, a third-party administrator of insurance plans with which Dr. McWhorter had had periodic contact concerning the then-existing insurance plan at his college.

In the fall of 1980, a joint committee of presidents of the colleges ("the Committee") was appointed by the Presidents' Association to study the then-existing insurance plans of the schools and to make recommendations for any changes. The Committee concluded that a self-funded insurance plan should be created; and it initially recommended a plan offered by Central Bank in association with Blue Cross, with life insurance provided by American Foundation Life Insurance Company.

The Committee again contacted L&H, this time to determine whether L&H could offer a better rate for the same coverage offered by Central Bank. Wilder undertook the task of "selling" the L&H plan to the Committee and, subsequently, to the individual employees. Although he knew that the plan was underfunded, based on the calculations and assumptions upon which it was premised, Wilder failed to disclose this fact to either the Committee

[1]The Alabama Trade School and Junior College Authority Act is codified at Ala. Code 1975, § 16-60-80 et seq.

or to the individual employees who chose to accept the plan.

The alternative plan proposed by L&H called for lower premiums than did the plan offered by Central Bank, and it was accepted by the Committee. This plan was reinsured by Harbor. The acceptance of the L&H plan led to the creation of the Alabama Junior/Community Colleges and Technical Colleges Employee Benefit Plan ("the Plan"). The Plan was subsequently presented to the employees of the schools and, eventually, over 1,300 employees at 28 of the schools decided to participate. The Plan collapsed after just one year of operation.

Following the collapse of the Plan, certain participants instituted several actions to recover damages from Wilder, L&H, and Harbor. After certification of the classes and consolidation of the actions, the cases proceeded to trial. The trial court ruled that the Plan was a "governmental plan" and, therefore, exempt from the provisions of ERISA. The jury returned special verdicts against Harbor on negligence claims, and against Wilder and L&H on negligence, wantonness, and fraud claims. These appeals followed.

On appeal, as at trial, the parties raise the issue of the preemptive effect of ERISA. Two threshold questions are presented: 1) Whether the Plan is one "established or maintained" by a governmental body and thus excepted from ERISA's operative effect; and 2) whether the plaintiffs' claims for fraud against Wilder and L&H fall outside the operative effect of the federal act. Because we find that the "governmental plan" exception to ERISA does not apply, we hold that the common law causes of action based upon negligence and wantonness, under which the plaintiffs recovered against all of the defendants, are preempted; thus, the judgments based on these claims are reversed. We further hold that the fraud claims against Wilder and L&H, amounting to claims for fraudulent inducement, are not preempted; thus, the judgments against these defendants on that claim are affirmed.

I.

In our treatment of the "governmental plan" exception, we have undertaken a three-part analysis: 1) The first step, when examining any insurance or benefit plan, is to determine whether the plan falls within the scope of ERISA's coverage; 2) if the plan is so covered, then we must next examine the exceptions to ERISA to ascertain whether any of them apply; and, finally, 3) if we find that the plan is within ERISA's coverage, and that no exception applies, we must examine the preemptive effect of these determinations.

Our inquiry begins with the language of the statute itself. The applicable section of ERISA, governing the scope of its coverage, is found at 29 U.S.C. § 1003:

> "(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—
>
> "(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
>
> "(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
>
> "(3) by both.
>
> "(b) The provisions of this subchapter shall not apply to an employee benefit plan if (1) such plan is a governmental plan (as defined in section 1002(32) of this title) . . .."

The definitions of an "employee welfare benefit plan" and of a "governmental plan" are found at 29 U.S.C. § 1002, which states, in relevant part:

> "(1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment ...
>
> "....
>
> "(32) The term 'governmental plan' means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

It is undisputed that the Plan involved in the present appeal is an employee benefit plan covered by the provisions of ERISA.[2] There is a dispute, however, over whether an exception to coverage applies. As noted earlier, the trial court ruled that the "governmental plan" exception applied and, therefore, that ERISA did not control the determination of liability under the Plan. We disagree.

Although the "governmental plan" exception has been discussed in several cases, an analysis of the available authority leaves us without a clear, definitive standard by which we may determine whether the Plan is a governmental plan. Thus, any plan must be closely examined to determine whether it falls within this excep-

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[2]It is important to note here that, while the *Plan* is covered by ERISA, a further determination is required to test ERISA's preemptive effect on the separate state law claims on which the special verdicts were based. See our later discussion of the fraud-in-the-inducement claims under part II of this opinion.

tion to the coverage of ERISA. Initially, we must bear in mind the broad scope of ERISA's preemption in the employee benefit field.

> "In determining whether various benefit policies fall within ERISA, courts should interpret the act's coverage broadly. *Sly v. P. R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983)."

Scwartz v. *Newsweek, Inc.*, 653 F.Supp. 384, 387 (S.D.N.Y. 1986), aff'd, 827 F.2d 879 (2d Cir. 1987).

One of the first cases to discuss the "governmental plan" exception was *Feinstein v. Lewis*, 477 F.Supp. 1256 (S.D.N.Y. 1979), aff'd, 622 F.2d 573 (2d Cir. 1980). In *Feinstein*, the court considered whether employee welfare plans, established as the result of a collective bargaining agreement between a union of public employees and their municipal or school district employers, were "governmental plans." The court went into a thorough discussion of the term "governmental plan" before ruling that the exception applied to the plans in question. In its analysis of the intention of Congress in enacting ERISA, the court stated:

> "These discussions clearly demonstrate that Congress, in exempting governmental plans, was concerned more with the governmental nature of public employees and public employers than with the details of how a plan was established or maintained."

Id. at 1262.

In its holding that the "governmental plan" exception applied, the *Feinstein* court emphasized that the governmental instrumentality, as the employer, provided 100% of the funding for the plans. Further, the *Feinstein* court reasoned that the mere fact that the public employers acted in conjunction with the employees' union, pursuant to a collective bargaining agreement, to establish and

maintain the benefit plan, "does not lead us to the conclusion that the plan was not 'established' by the [public employers]." *Id.* at 1260.

An equally extensive discussion of the 'governmental plan' exception is found in *Rose* v. *Long Island R.R. Pension Plan*, 828 F.2d 910 (2d Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1112, 99 L.Ed.2d 273 (1988). The court in *Rose* ruled that a plan established by the Long Island Railroad was, under the facts of the case, a governmental plan. Of particular interest is the analysis used by the *Rose* court to define the terms "agency or instrumentality." These two terms are not defined in ERISA; but the *Rose* court reasoned that the definitions given these terms by the Internal Revenue Service, one of the agencies charged with enforcing ERISA, were entitled to great deference. The term "governmental plan" is defined at 26 U.S.C. § 414(d), and this definition is virtually identical to the one found at 29 U.S.C. § 1002(32).

> "In interpreting the § 414(d) exemption, the IRS has consistently relied on Revenue Ruling 57-128, 1957-1 C.B. 311, which lists six factors to be considered in determining whether a particular entity is an agency or instrumentality:
>
> "In cases involving the status of an organization as an instrumentality of one or more states or political subdivisions, the following factors are taken into consideration: (1) whether it is used for a governmental purpose and performs a governmental function; (2) whether performance of its function is on behalf of one or more states or political subdivisions; (3) whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner; (4) whether control and supervision of the organization is vested in public authority or authorities; (5) if express or implied statutory or other authority is

> necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and (6) the degree of financial autonomy and the sources of its operating expenses."

Rose, 828 F.2d at 918.

After an examination of these factors, as they relate to the present appeal, we find that the Plan was not established or maintained by an agency or instrumentality of the State of Alabama, or any political subdivision of it. While it could be argued that some of the six factors listed above apply to the Plan, we nonetheless conclude that, under the totality of the circumstances, the Committee was not an agency or instrumentality of the State; thus, the Plan is not a governmental plan.

Because we find that the Committee is not an agency or instrumentality of the state, we further hold that the Plan was not established or maintained by the state. The Plan was established by the independent actions of the presidents of some of Alabama's junior and technical colleges. This clearly does not meet the establishment criteria contained in the "governmental plan" exception. Neither is the Plan maintained by the state. The only fact that supports the allegation that the Plan was maintained by the state is that part of the premiums paid by the participants came from funds provided by the state, to all similarly situated employees, that these employees could use to pay for part of any insurance coverage they chose. This payment, which came indirectly from the state, is not sufficient to support a conclusion that the Plan was maintained by the State.

Our conclusion is further supported by the fact that the "governmental plan" exception was contemplated as a narrow exception to the otherwise expansive coverage of ERISA. In a federal case quite similar to the present one, the district court discussed the reasons behind a narrow construction of this exception:

> "Indeed, the legislative history's frequent reference to the exception simply as the 'governmental plan' exception, . . . without ever elaborating on the significance of the individual terms chosen to describe the scope of the exception, suggest that the exception was meant to cover the entire range of organizations traditionally characterized as governmental organizations, but not to expand the range to include organizations having some significant relationship with a government but not themselves viewed as governmental."

Krupp v. Lincoln University, 663 F.Supp. 289, 292 (E.D.Pa. 1987).

In *Krupp*, the court ruled that a university's health care plan was not a governmental plan, even though a legislative act had established the university as an instrumentality of the Commonwealth. The fact that the university was characterized as a "state-related institution," reasoned the *Krupp* court, did not mandate that its insurance plan be considered a governmental plan. We approve the rationale for the *Krupp* decision, and we hold that the instant Plan is not a governmental plan.

As was previously mentioned, we realize that there is no clear guide to determine when the "governmental plan" exception to ERISA applies. There have been cases involving colleges in which the insurance plan was properly found to be a governmental plan. See ERISA Op. Letter No. 77-13; and ERISA Op. Letter 76128. However, under the particular facts of the present case, we do not find these authorities to be controlling here.[3]

Because the "governmental plan" exception does not apply to

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[3] For a thorough discussion of the "governmental plan" exception and the cases and interpretive releases analyzing it, see RIA *Employment Coordinator*, ¶ B-10131 to B-10133, at 30, 115-118.

the instant Plan, the provisions of ERISA are applicable here. The preemptive provisions of ERISA are found at 29 U.S.C. § 1144:

> "Except as otherwise provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975."

In discussing this section, the United States Supreme Court has provided guidance in understanding the scope of the preemptive aspects of ERISA:

> "To summarize the pure mechanics of the provisions quoted above: If a state law 'relate[s] to . . . employee benefit plan[s].' it is pre-empted. § 514(a). The saving clause excepts from the pre-emption clause laws that 'regulat[e] insurance.' § 514(b)(2)(A). The deemer clause makes clear that a state law that 'purport[s] to regulate insurance' cannot deem an employee benefit plan to be an insurance company. § 514 (b)(2)(B) [state laws that regulate insurance, banking, or securities are not preempted by ERISA].
>
> "... We have observed in the past that the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' [Citations omitted.]"

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987).

II.

In regard to the state common law claims for fraud against Wilder and L&H, we hold that these claims are not preempted under the provisions of ERISA and we affirm that aspect of the trial court's judgments. In the recent case of *HealthAmerica v. Menton*, [Ms. 87-1100, July 21, 1989] _____ So.2d _____ (Ala. 1989), we held that a claim for fraud in the inducement does not "relate to" an employee benefit plan and is therefore not preempted by ERISA.

In the instant case, the plaintiffs, relying upon, among other things, Wilder's misrepresentations that the plan was "fully funded," forwent accepting the plan offered by Central Bank and accepted the L&H Plan. With their acceptance of the L&H Plan, however, the plaintiffs did not receive the promised benefits. The plaintiffs, according to their claim for misrepresentation, were not damaged as a result of the fraudulent administration of the Plan or as a result of non-payment pursuant to the Plan; rather, as a consequence of the misrepresentations and promises of benefits, they were induced to accept the L&H Plan, as opposed to a more adequately funded plan. This "fraud in the inducement" claim is not covered by the provisions of ERISA; therefore, it falls outside ERISA's preemptive effect.

The facts of the instant case fall clearly within the holding in *HealthAmerica*. L&H knew that the Committee had received from Central Bank a proposal for a plan in which the Committee had expressed an interest. In order to "sell" its proposal to the Committee and the schools' personnel, L&H had to offer a plan that was competitive with that proposed by Central Bank. The fraud committed by Wilder, on behalf of L&H (i.e., offering the Plan with knowledge that L&H's own actuarial criteria for a viable plan showed inadequate funding), was aimed at inducing the Committee and the individuals it represented to select L&H's proposal over that of its competitor. Conduct of this nature will not be tolerated in Alabama; and it was not the intent of Congress, in enacting

ERISA, to preclude state regulation of such activity. See *HealthAmerica, supra*, and the cases cited therein.

L&H contends that the trial court erred in certifying the plaintiff classes because "commonality" and "typicality" do not exist, as required by A.R.Civ.P. 23(a)(2) and (3). We disagree, and we hold that there are questions of law and fact common to the classes and that the claims of the representative parties are typical of the claims of the classes.

Although the misrepresentations were made to the members of each class at varying times, the misrepresentations were basically the same and were redressable under the same theory of recovery. Where plaintiffs allege and prove a standard claim for fraud based on misrepresentations with a common thread, as is the case here, their cause is maintainable as a class action.

It is within the sound discretion of the trial court to certify a class under Rule 23, and we will reverse such a ruling only upon a showing of an abuse of that discretion. *Marshall Durbin of Jasper, Inc. v. Jasper Utilities Board of the City of Jasper*, 437 So.2d 1014 (Ala. 1983). We have not been shown that the trial court abused its discretion in certifying the classes in the instant case.

Therefore, the judgments against Wilder and L&H, based on the non-preempted fraud claims, are affirmed; the judgments against all the defendants based on the remaining preempted state law claims are reversed; and the cause is remanded for entry of judgments consistent with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS AS TO 87-391 AND 87407.

AFFIRMED AS TO 87-487.

Hornsby, C. J., and Adams, Steagall, and Kennedy, JJ., concur.

Maddox, Almon, Shores, and Houston, JJ., concur in part and dissent in part.

Harbor Insurance Co. v. Blackwelder
Life & Health Services, Inc. v. Blackwelder

MADDOX, JUSTICE (concurring in part and dissenting in part).

I concur in the portion of the majority's opinion that holds that the fraud claims are not preempted by ERISA, but because I am of the opinion that this was a "governmental plan," I would hold that none of the claims in this case are preempted, and I would affirm.

ERISA defines "governmental plan" as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." 29 U.S.C. § 1002(32). The factors listed in *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910 (2d Cir. 1987), cert. denied, ___U.S. ____ 108 S.Ct. 1112 (1988), show that the "governmental plan" exception should be interpreted broadly. In this case, the plan was for government employees and their dependents; its trustees consisted of government employees who established and maintained the plan, and it was partially funded with government money. I believe that this plan was exempt from ERISA and that none of the plaintiffs' claims are preempted. Therefore, I must dissent from that portion of the majority's opinion holding that certain claims were preempted.

SHORES, JUSTICE (concurring in part and dissenting in part). I concur in part II of the opinion and join Justice Maddox's dissent as to Part I.

Almon, J., concurs.

Harbor Ins. Co. v. Blackwelder

HOUSTON, JUSTICE (concurring in part; dissenting in part).

See my dissent in *HealthAmerica v. Menton*, [Ms. 87-1100, July 21, 1989] _____ So.2d _____ (Ala. 1989). I would reverse and remand to permit the plaintiffs to amend their fraud cause of action to proceed with a cause of action under ERISA, 29 U.S.C. § 1132(a). Therefore, I concur in part and dissent in part.

APPENDIX C
-C1-

HARBOR INSURANCE COMPANY,

LIFE & HEALTH SERVICES, INC., et al.

Appellant

v.

Robert E. Blackwelder, et al.

Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today.

Application for rehearing overruled. No opinion written on rehearing. Jones, J. Hornsby, CJ., Adams, Steagall and Kennedy, J.J., concur; Maddox, Almon, Shores and Houston, J.J., concur in part and dissent in part.

Robert G. Esdale, Clerk
Supreme Court of Alabama

11/17/89
bsa

APPENDIX D

December 31, 1975

Dear

This is in response to your letter requesting a determination as to whether the pension plan of the _____ Fire Protection District is covered under the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). We regret the delay in answering.

According to the information we have received from you, the plan was established by the _____ Fire Protection District for its paid and volunteer employees and is administered by a board of trustees consisting equally of municipal officials and members of the fire department. The plan is funded by the State of _____, by property taxes levied in the district and by contributions from the paid employees.

Section 4 (b) (1) of the ERISA exempts governmental plans from coverage thereunder. Section 3 (32) defines the term "governmental plan", in part, to mean a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the forgoing.

Based on the above, it is concluded that the plan is established and maintained by the _____ Fire Protection District, an agency of the State of _____. Accordingly, it is a "governmental plan" as defined in section 3 (32) of the ERISA, and is exempt from coverage thereunder pursuant to the provisions of section 4 (b) (1).

Sincerely,

The following is a summary of representations made in materials submitted to the Department in this matter. Each of the Plans was

established in accordance with a collective bargaining agreement between an employer and Teamsters Union Local 237 (the Union). Each such employer is either a town or public school district, and the employees covered by each such plan are employees of the respective town or public school district. In all cases employer contributions provide the exclusive source of funding. Each plan is jointly administered by trustees appointed by the Union and trustees appointed by the employer in equal numbers. The terms of the Plans provide that in the event of a deadlock between the employer and Union trustees, the matter is to be submitted for decision to an arbitrator.

Section 3 (32) of ERISA, in relevant part, defines the term "governmental plan" to mean "a plan established or maintained for its employees by ... the government of any State or political subdivision thereof, or by an agency or instrumentality of any of the foregoing." Section 4 (b) (1) of ERISA states that the provisions of Title I of ERISA shall not apply to a governmental plan described in section 3 (32). We assume that each of the towns and school districts whose employees are covered by the Plans is a political subdivision of a state or an agency or instrumentality of such a political subdivision.

In the materials submitted on behalf of the Plans to the Department in this matter, the argument is made that, because the Plans were established pursuant to collective bargaining agreements between the employers and the Union, and not by the unilateral acts of the employers, the Plans were not "established" by governmental entities within the meaning of section 3 (32). The argument is also made that, because the Plans are administered by boards of trustees which are comprised of equal numbers of employer and Union trustees, they are not "maintained" by governmental entities within the meaning of section 3 (32) since the employer trustees do not control the boards or policies of the Plans, and, according to the Plans' submissions, the employer trustees do not play a substantial or leading role in the daily administration of the Plans.

Notwithstanding these arguments, it is the view of the Department that the Plans in question are governmental plans within the meaning of section 3 (32).

In our view, the term "governmental plan," as defined in section 3 (32) of ERISA, is not so narrow as to include only plans established by the unilateral action of employers which are governmental entities and plans which are ultimately within the exclusive control of governmental entities. Neither the language of section 3 (32), nor the legislative history relevant to that section indicate that the definition of "governmental plan" set forth in that section was intended to embrace only such plans.[1] In the absence of a clear expression of legislative intent regarding the scope of the term "governmental plan," as defined in section 3 (32), that term must be interpreted in light of such evidence as is available regarding the reasons underlying Congress' exclusion in section 4 (b) (1) of plans that meet the definition from coverage under Title I of ERISA. The available evidence does not suggest that this section was intended to encompass only plans established by the unilateral action of a governmental entity and plans "controlled" solely by a governmen-

---

[1] Congressional committee reports, in passages relating to the coverage provisions of predecessor bills of ERISA, discuss the issue of whether plans sponsored by governmental entities should be subject to pension reform legislation in broad, general terms such as "coverage of public employee plans," "reform in the public sector," and "plans sponsored by state and local government." H. R. Rep. No. 93-533 93d Cong., 1st Sess. (1974), at 9; H. R. Rep. No. 93-779 93d Cong., 2d Sess. (1974), at 46. Remarks of individual legislators on this issue are equally general. In his additional views to H. R. Rep. No. 93-533 (at pp. 43-44), Representative Erlenborn supported the coverage under the fiduciary responsibility and disclosure provisions of H. R. 2 of "public retirement plans," but suggested that such plans should have been made subject to the proposed minimum vesting and funding standards as well, referring to the desirability of "blanketing . . . public employees under Federal pension legislation" Similarly, in the House of Representatives discussions of the Conference Report accompanying ERISA, Representative Broyhill stated that he "felt that Government employees should at least be entitled to the same protections granted those in the private sector." Congressional Record-House, August 20, 1974, reprinted in Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess., at 4685 (Comm. Print 1976).

tal entity. Under these circumstances, we do not believe it is appropriate to exclude collectively bargained plans and plans jointly administered by trustees appointed by governmental entities and by labor unions from the "governmental plan" definition, if these plans are funded by the cover only employees of governmental entities.

In this connection, the legislative history and the statute itself contain indications that Congress was reluctant to extend the requirements of ERISA to plans covering employees of governmental entities without first collecting further information on these plans and on the possible need for, and effects of, federal legislation in this area.

In the passage including the remarks quoted in footnote 1 above, Representative Broyhill stated that he "reluctantly agreed it would be a mistake to take hasty action in this area [i.e., plans covering employees of government entities]" and that he "supported the provisions which provided for a study of this entire question." Section 3031 of ERISA directs appropriate House and Senate Committees to "study retirement plans established and maintained or financed (directly or indirectly) by the Government of the United States, by any State (including the District of Columbia) or any political subdivision thereof, or by any agency or instrumentality of any of the foregoing." Such study is to include an analysis of —

> (1) the adequacy of existing levels of participation, vesting and financing arrangements,
>
> (2) existing fiduciary standards, and
>
> (3) the necessity for Federal legislation and standards with respect to such plans.

We do not think that a narrow interpretation of section 3 (32) to exclude from the "governmental plan" definition plans which are

collectively bargained or jointly administered would be consistent with Congress' reluctance in the absence of extensive information, to apply federal regulatory standards in this area. In view of the questions that the report required under section 3031 was directed to address, *it appears that when ERISA was enacted, available information was not sufficient to serve as a basis for determining the precise circumstances in which federal regulation of plans covering public employees would be necessary and appropriate.* Accordingly, we believe that section 3 (32) should not be so narrowly interpreted as the materials submitted to the Department on behalf of the Plans suggest.

Among other considerations which led Congress not to impose federal regulatory standards on governmental plans when ERISA was enacted, the legislative history indicates that Congress was specifically concerned about the possible effects of requiring State and local governments to meet federal funding requirements. H.R. 12855 would have required the House Ways and Means Committee to undertake a study "to determine whether requiring governmental plans to adhere to the new [funding] standards ... would entail unacceptable cost implications to governmental entities."[2] Although the Plans at issue in this matter are not pension or rètirement plans, an interpretation of section 3 (32) under which a plan would not be deemed to be a governmental plan if its administration is not "controlled" by a governmental entity (as you have used that expression) would lead to the result that any defined benefit or money-purchase pension plan administered by a joint board composed in equal numbers of employee representatives and individuals appointed by a governmental entity would be subject to the minimum funding standards set forth in Part 3 of Title I of ERISA. The Congressional report that was prepared pursuant to section 3031 indicates that employee representatives constitute a board majority in about one-third of all federal, state and local

---

[2] H. R. Rep. No. 93-807 93d Cong., 2d Sess. (1974), at 165.

retirement systems.[3] Thus, *if section 3 (32) were interpreted to mean that a plan would not be deemed to be a governmental plan if its administration is not controlled by a governmental entity, a significant portion of retirement plans covering employees of governmental entities would not be deemed to be governmental plans. In our view, such an interpretation would be inconsistent with Congress' reluctance to impose federal minimum funding requirements on state and local governmental entities without further study of the effects that such requirements would have.*

The Department has previously interpreted the phrase "established or maintained" in the context of regulations under the definitions of "welfare plan" and "pension plan" in sections 3 (1) and section 3 (2) of ERISA, respectively, in a manner consistent with the view that a plan is "established or maintained" by an employer who makes contributions to it or who is involved to a significant degree in its administration. Specifically, in 29 CFR § 2510. 3-1 (j), relating to certain group or group-type insurance programs, § 2510.3-2 (d), relating to certain individual retirement accounts, and § 2510.3-2 (f), relating to tax sheltered annuity programs, the Department has taken the position that certain types of arrangements are established or maintained by an employer if, among other factors, such arrangements are funded at least in part through contributions made by the employer, or if the employer is involved in the discretionary administration of the arrangement.[4] We believe that similar considerations are applicable in interpretation of the words "established or maintained" as used in section 3 (32).

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[3] Pension Task Force Report on Public Employee Retirement Systems 95th Cong., 2d Sess. (Comm. Print. 1978), at pp. 66-67.

---

[4] Each of the relevant regulations provides that an arrangement of the specified type is not established or maintained by an employer, and, therefore, is not a welfare plan or pension plan within the meaning of section 3(1) or (2), as the case may be, if, among other conditions, such arrangement is not funded through employer contributions, and if participation of the employer is limited to certain specified activities, none of which involves, as here, the exercise of fiduciary duties.

Finally, we note that in ERISA Opinion 75-36 (December 31, 1975), the Department concluded that a plan covering employees of a fire protection district and administered by a board of trustees consisting of municipal officials and members of the fire department in equal numbers was deemed to be a "governmental plan" as defined in section 3(32). A copy of that letter is enclosed herewith.

Sincerely,

Ian D. Lanoff
Administrator

Enclosure

U.S. DEPARTMENT OF LABOR

MAY 18, 1983

OPINION NO. 83-24A
SEC. 3 (32)

Mr. Leon Rothenberg
Executive Director
Federation of Tax Administrators
444 North Capitol Street, N.W.
Washington, D.C. 20001

Dear Mr. Rothenberg:

This is in reply to your letter of August 27, 1982, requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the FTA Staff Pension Plan is a governmental plan within the meaning of section 3 (32) of ERISA.

You advise that the FTA Staff Pension Plan is maintained by the Federation of Tax Administrators (FTA) for its employees. FTA is a non-profit association whose membership consists of the revenue agencies of the fifty states and of the District of Columbia. Originally organized in 1937 in Illinois, FTA is currently incorporated in the District of Columbia. The FTA By-laws state that, in pursuit of its purpose of improving the techniques of tax administrators, FTA will establish a clearinghouse for the interchange of information and undertake research into tax and administrative problems confronting FTA members. FTA is governed by its Board of Trustees which consists of the Executive Committee of the National Association of Tax Administrators (NATA), the three most recent ex-presidents of NATA holding office as tax administrators, one member each from the National Tobacco Tax Association and the North American Gasoline Tax Conference, and one member from each of the Federal, state, and foreign government tax sectors. FTA is funded by assessments against individual state revenue

departments (87 percent of FTA's 1981-82 fiscal year income), income from surplus funds, and sales of its publications to the public. Each member is annually accessed a percentage of its total revenue collections.

Section 4 (b) (1) of title I of ERISA excludes governmental plans as defined in ERISA section 3 (32) of title I from coverage under title I of ERISA. The definition of the term "governmental plan" provided in section 3 (32) includes "... a plan established or maintained for its employees" by an agency or instrumentality of the government of any state.

In view of the substantial sponsorship and contributions by the several states to FTA for its operation and the interrelationships among the states, the revenue agencies of the several states, and FTA, we conclude that the FTA Staff Pension Plan is a governmental plan within the meaning of ERISA section 3 (32) and is, therefore, excluded by ERISA section 4 (b) (1) from coverage under title I of ERISA.*

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs

---

* This opinion takes no position as to whether NAIC constitutes specifically an "agency" or an "instrumentality" of State government or concerning whether employees of FTA are employees of any specific governmental unit.

APPENDIX F

U. S. Department of Labor

Labor Management Services Administration
Washington, D.C. 20216

Reply to the Attention of:

Opinion 81-82A
Sec. 3(32)

Nov. 23, 1981

Mr. Richard A. Hemmings
National Association of
Insurance Commissioners
Suite 1015
633 W. Wisconsin Avenue
Milwaukee, Wisconsin 53203

Dear Mr. Hemmings:

This is in reply to your letter of May 4, 1979, submitting a current plan document in connection with your request for an advisory opinion regarding applicability of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, your request, which was originally submitted along with notice to the Department that reports required under ERISA title I would no longer be filed, concerns whether a retirement plan and trust for employees of the National Association of Insurance Commissioners (NAIC) is a governmental plan within the meaning of ERISA.

The NAIC is a unincorporated association whose membership consist of the insurance commissioners of the 50 States, Guam, Puerto Rico and the Virgin Islands. The NAIC has been in continuous operation under its own governing body elected from among its membership since its establishment in 1871. The insurance commissioner is the principal insurance regulatory authority in State government who has the responsibility for regulating the insurance business. To assist the commissioners in the operation of

the organization, the NAIC has two staffs, the Executive Secretary's Office and the Valuation of Securities Office. The Executive Secretary's Office provides staff research support, and administrative services to the NAIC in general and individual insurance departments in particular. The primary function of the Valuation of Securities Office is to value insurance company investments for purposes of providing uniformity when insurance companies submit the annual statements each year to the insurance departments. The bulk of financial support to the Executive Secretary's Office comes from assessments against the individual state insurance departments. The Valuation of Securities Office receives its funds from several sources. Several states have statutes authorizing assessments against those states based upon the admitted value of stocks and bonds of life insurance companies therein. In addition, other states make voluntary contributions out of the state insurance department budget. Other sources of funds include the sale of the valuation manual, and fees for certain services provided.

Article 2 of the Constitution of the NAIC provides that the object of this Association shall be to promote uniformity in legislation affecting insurance; to encourage uniformity in departmental rulings under the insurance laws of the several states; to disseminate information of value to insurance supervising officials in the performance of their duties; to establish ways and means of fully protecting the interests of insurance policyholders of the various states, territories and insular possession of the United States; and to preserve to the several states the regulation of the business of insurance.

You have submitted, among other things, the following letters in support of your request for an advisory opinion:

1. A letter dated May 23, 1955, from H. T. Swartz, Director, Tax Rulings Division, Office of the Commissioner of Internal Revenue, United States Department of the Treasury, designating NAIC as an instrumentality wholly owned by the states for purposes of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act.

2. A letter dated December 7, 1973, from Leonard J. Lurie, Director, Office of Labor-Management and Welfare Pension Reports, Labor-Management Services Administration, United States Department of Labor, concluding that NAIC is a State agency or instrumentality and that the retirement plan it administers for its employees is a governmental plan excluded from coverage by the Welfare Pension Plans Disclosure Act (the WPPDA).

3. A letter dated August 30, 1974, from L. M. Phillips, District Director, Internal Revenue Service, stating that NAIC ". . . is an instrumentality of the states as manifested by the interest, authority, and powers exercised by their official representatives . . .," and concluding that NAIC is exempt from Federal excise taxes.

4. A letter dated May 1, 1969, from Hugh F. McKenna, Director, Bureau of Retirement and Survivors Insurance, Social Security Administration, United States Department of Health, Education and Welfare, indicating that NAIC, as an interstate instrumentality has the status of a state for purposes of coverage by Social Security.

The definition of a governmental plan provided in section 3(32) of ERISA includes "a plan established or maintained for its employees" by an agency or instrumentality of the government of any state.

In view of the substantial contributions by the several states to NAIC for its operation, including its retirement plan and trust for employees, and the interrelationships among the states, the insurance departments of the several states, and the NAIC, we conclude that the retirement plan for NAIC employees is a governmental plan within the meaning of ERISA section 3(32) and is, therefore, excluded by ERISA section 4(b)(1) from coverage under title I of ERISA.*

This letter constitutes an advisory opinion under ERISA Proce-

dure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Ian D. Lanoff
Administrator
of Pension and Welfare
Benefit Programs

Supreme Court, U.S.
FILED
APR 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1554

IN THE

Supreme Court of the United States

October Term 1990

ROBERT E. BLACKWELDER, et al.,

Petitioners,

VS.

LIFE AND HEALTH SERVICES, INC., et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR RESPONDENT HARBOR INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney For Respondent
Harbor Insurance Company

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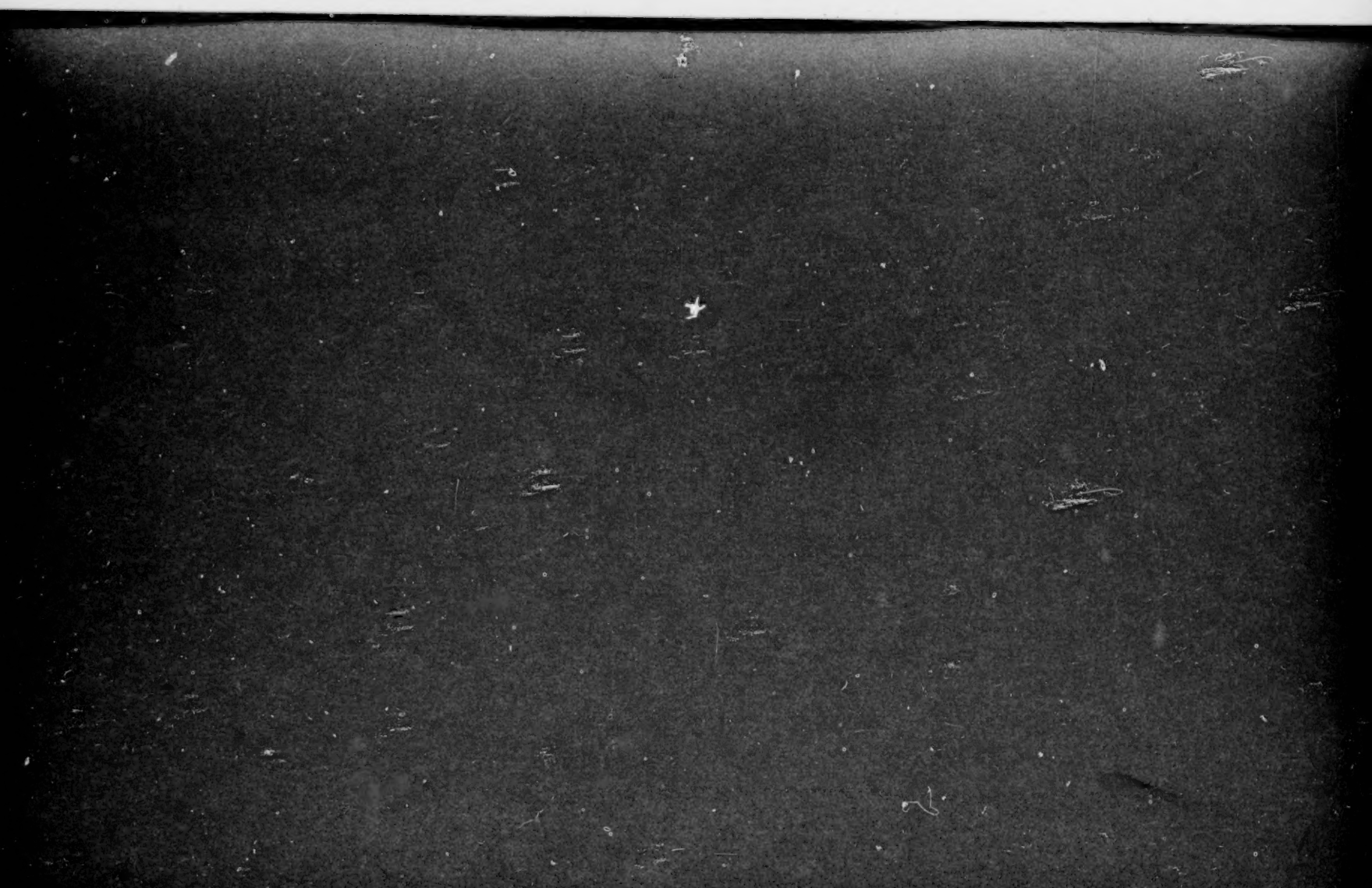

QUESTION PRESENTED FOR REVIEW

I. Whether a self-funded employee welfare benefit plan available to employees of the Junior, Community, and Technical Colleges of the State of Alabama in 1981 and 1982, was a "governmental plan" as defined in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(32) [ERISA].

PARTIES

In the Supreme Court of Alabama, the parties were:

1. Robert E. Blackwelder, as representative of a class of persons who were participants in a self-funded employee welfare benefit plan, known as the Alabama Junior/Community Colleges and Technical Colleges Employee Benefit Plan, who incurred medical expenses which were presented to the Plan, but were not paid. Plaintiffs/Appellees.

2. Mary R. Holley, as representative of a class of persons who were participants in the Plan, who either incurred no medical expenses or who presented medical expenses to the Plan which were paid. Plaintiffs/Appellees.

3. Life and Health Services, Inc., administrator of the Plan. Defendant/Appellant.

4. Betty Duncan, as Administratrix of the Estate of Robert E. Wilder, President of Life and Health Services, Inc. Defendant/Appellant.

5. Harbor Insurance Company, reinsurer of the Plan. Defendant/Appellant.[1]

---

1. Pursuant to Supreme Court Rule 28.1, please take note that Harbor Insurance Company is a wholly owned subsidiary of The Continental Corporation. Its affiliated companies are listed in Appendix I attached hereto.

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OPINIONS BELOW

There was no opinion issued by the Circuit Court for Montgomery County, Alabama, which addressed the issue presented here for review. On December 30, 1987, the Circuit Court for Montgomery County (Fifteenth Judicial Circuit) entered an "Order on Pending Motions and Judgment On Nonjury Issue," in which it held that the self-insurance fund at issue in this case was a governmental plan as defined by ERISA, and is exempted from ERISA requirements, so as not to preclude common-law causes of action. Judgment was entered in favor of the plaintiff classes and against the defendants on this issue. See Appendix A attached hereto. The defendants appealed the case to the Supreme Court of Alabama, where consoli dated appeals were assigned Supreme Court Case Nos. 87-391, 87-407, and 87-487.

On September 29, 1989, the Alabama Supreme Court rendered its opinion which, in part, reversed some of the judgments entered by the Trial Court. As pertinent to the Question Presented, the Court ruled, by a six to three vote, that the Trial Court erred in its holding that the Plan was a governmental plan exempt from the provisions of ERISA. *Harbor Insurance Co. v. Blackwelder, et al.*, 554 So.2d 329 (Ala. 1989). See Appendix B attached hereto.

The Application for Rehearing filed on behalf of the Plaintiffs/ Appellees was denied without opinion on November 17, 1989. See Appendix C attached hereto.

JURISDICTION

Respondent Harbor Insurance Company concedes that the Petitioners' statement of jurisdiction is sufficient to enable this Court to entertain its Petition for Writ of Certiorari, pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions recited in the Petition for Writ of Certiorari, the following additional provision of the Employee Retirement Income Security Act of 1974 is involved in the issue presented by the Petition:

"29 U.S.C. § 1144. **Other laws.**

(a) **Supersedure; effective date.** Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]. . . .

***

(c) **Definitions.** For purposes of this section:

(1) The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . ."

STATEMENT OF THE CASE

A. *Identification of the Parties*

The Petitioners before this Court are two classes of persons employed by 28 of the 43 junior, community and technical colleges operated by the State of Alabama in 1981 and 1982. Each of the Petitioners elected to participate in an employee welfare benefit plan created in 1981, known as the Alabama Junior/Community Colleges and Technical Colleges Employee Benefit Plan (hereinafter referred to as the "Plan").

Respondent Life & Health Services, Inc. (hereinafter "Life & Health") contracted to assist in the creation and administration of the Plan, and was instrumental in promoting the Plan to the Petitioners. Robert Wilder was the president of Life & Health.

Respondent Harbor Insurance Company provided reinsurance of a portion of the benefits offered by the Plan, pursuant to an Excess Medical Stop-Loss Reinsurance Agreement. The Reinsurance Agreement obligated Harbor to reimburse the Plan for certain amounts of health benefits paid in excess of stated "attachment points," which are somewhat similar to deductibles in traditional health insurance policies.

B. *Control of the Alabama Junior, Community and Technical College System*

Prior to May 4, 1982, the Alabama Trade School and Junior College Authority Act, *Ala. Code* §§ 16-60-80, *et seq.*, (1975)[2], charged the Alabama State Board of Education with the responsibility for the "operation, management, control, supervision, maintenance, regulation, upkeep, improvement, equipment, and enlargement of and additions to" Alabama's junior, community and technical colleges. *Ala. Code* § 16-60-111 (1975) (repealed by 1982 Alabama Acts, No. 82-486, § 2, effective May 4, 1982). Effective May 4, 1982, those responsiblities were vested in the Chancellor of Postsecondary Education, subject to approval by the State Board of Education. *Ala. Code* § 16-60-111.2 (1975).

The State Board of Education discharges its statutory duties through regular meetings, the minutes of which are public records. With regard to insurance, the minutes demonstrate that, yearly, the Board received recommendations for the purchase of consolidated liability insurance for all vehicles owned by the junior, community and technical colleges, for specified policy limits, for a specified premium cost, to be purchased through a specified insurance agency, and that the Board passed a resolution approving the purchase of such liability insurance. By contrast, the minutes of the Board meetings between 1979 and the end of 1982 contain no reference to any proposal to study, create, fund, or operate a consolidated employee welfare benefit plan for the employees of the schools.

---

2 Effective May 4, 1982, the Alabama Trade School and Junior College Authority Act was substantially amended, by the creation of the Postsecondary Education Department, defined as a "parallel organization to the state department of education directly responsible to the state department of education for the direction and supervision of junior colleges and trade schools and community colleges with a chief executive officer entitled a chancellor." *Ala. Code* § 16-60-110(6) (1975).

In September of 1981, the State Board of Education passed a resolution which stated that "hospital medical insurance assistance will be provided for all full-time employees in Alabama's public junior, community and technical colleges/institutes and Athens State College and that this assistance will not exceed Three Hundred Nine Dollars ($309) per year per person." There was no restriction on the use of the funds by the employees for the purchase of any particular insurance, nor were the funds deemed available only for the purchase of "authorized" or "approved" insurance programs.

C. *Creation of the Plan*

In the fall of 1980, the Alabama Junior Colleges Presidents Association and the Alabama Technical Colleges Presidents Association formed a joint committee, called the Presidents Insurance Committee, to study the existing health insurance programs of the various schools. The Presidents Insurance Committee determined that a consolidated self-funded employee benefit plan should be created, and thereafter considered a plan offered by Central Bank, in association with Blue Cross. However, before the Central Bank-Blue Cross plan was adopted, committee member Dr. William McWhorter contacted Life & Health and solicited a competitive bid for a consolidated health benefit program.

Life & Health prepared its own proposal for a consolidated self-funded employee benefit plan, which included medical and hospital benefits to be provided through a trust funded by contributions from those employees who elected to participate, excess stop-loss reinsurance to be purchased from Harbor, and life insurance to be purchased from another insurance company.

In September of 1981, the Presidents Insurance Committee, which by then also included "insurance reps" representing the employees of the schools, heard presentations from a representative of Central

Bank and from Robert Wilder on behalf of Life & Health, and voted to adopt the Plan offered by Life & Health. On September 24, 1981, the Committee, on the letterhead stationery of the Alabama Technical Colleges Presidents Association, sent a memorandum to the president of each school stating that the Presidents Insurance Committee had agreed upon a self-funded medical/health insurance program, and that representatives of Life & Health would soon be contacting them to explain the Plan.

D. *Operation and Demise of the Plan*

The Plan was created and operated pursuant to a Trust Agreement, which was prepared by Life & Health and executed by four junior and technical college presidents and by the secretary to a fifth president, as Trustees. The Trustees also entered into an Administration Services Agreement with Life & Health to administer the Plan, and the above-referenced Excess Medical Stop-Loss Reinsurance Agreement with Harbor.

The stated purpose of the Trust Agreement was to provide and maintain health benefits for participating school employees and their families, to establish a fund of money, and to accumulate as part of that fund an adequate reserve to carry out the purpose of the trust.

In order to fund the trust, the Trust Agreement empowered the Trustees "to demand, collect and receive employer and employee contributions" and "to specify the exact time and manner in which the payment of such contributions are to be made . . . ." On the recommendation of Life & Health, the Trustees adopted employee and family contribution rates ("premiums") which quickly proved insufficient to pay for the health benefit claims submitted on behalf of the employee participants. By the end of the first year the Plan had accumulated approximately $600,000.00 more in payable claims than it had funds to pay. The paid claims did not reach the attachment point of the Harbor Reinsurance Agreement.

Wholesale withdrawal of employees from participation in the Plan occurred at the end of 1982, and the Plan was thereby rendered defunct. Litigation followed in May of 1983.

E. *Course of Proceedings Below*

In May 1983, Life & Health filed a Petition for Declaratory Judgment and Other Relief in the Circuit Court for Montgomery County, Alabama, which sought an order requiring the Plan participants to contribute additional funds to pay the obligations of the Plan, and a declaration that Harbor was obligated to pay a $118,373.44 claim submitted by the Plan under the Reinsurance Agreement. Petitioners Blackwelder and Holley, and others, were named as class representatives of the Plan participants in this declaratory judgment action.

Blackwelder and Holley filed Motions to Dismiss the Life & Health Petition for Declaratory Judgment in July of 1983, on the ground, among others, that Congress has preempted the field and subject matter of employee benefit plans such as that described and made the subject matter of the Petition for Declaratory Judgment. See Appendices D and E attached hereto. These were the first references to the applicability of ERISA to the issues raised in this action. The Trial Court denied the Blackwelder and Holley Motions to Dismiss without opinion. See Appendix F attached hereto.

Thereafter, Blackwelder and Holley sought recovery of damages from Life & Health, the Plan, the Trustees, and Harbor for their alleged violation of the provisions of ERISA, and for negligence, wantonness, fraud, breach of fiduciary duty, bad faith, and breach of contract.

In October of 1983, the Trial Court realigned the parties, designating as plaintiffs the "Blackwelder class" and the "Holley class." Life & Health, the Plan, the Trustees, Wilder, and Harbor were designated as defendants.

The plaintiff classes settled their claims against the Trustees for a payment of $205,000.00.

In April of 1987, Harbor filed a Motion for Partial Summary Judgment seeking, in part, judgment in its favor as to the issue of ERISA's pre-emption of the claims of negligence, wantonness, fraud, and breach of contract asserted against it. See Appendix G attached hereto. The response to this Motion was the first instance in which the "governmental plan" exemption from ERISA was specifically raised. The Trial Court deferred ruling on that aspect of Harbor's Motion for Partial Summary Judgment, until after the trial of the common-law claims asserted against the defendants.

The jury trial of the plaintiffs' common-law claims resulted in verdicts in their favor on their negligence claims against all three defendants, assessing damages of $720,000.00 in favor of the Blackwelder class and $170,000.00 in favor of the Holley class. The jury also returned verdicts against Life & Health and Wilder on the wantonness and fraud claims, and assessed damages under the fraud claims totaling $1,668,000.00 in favor of the Blackwelder class, and $350,000.00 in favor of the Holley class. The jury returned verdicts in favor of Harbor on the plaintiffs' wantonness, fraud, and breach of contract claims.

On December 30, 1987, the Trial Court held that the subject employee benefit plan was a governmental plan as that term is defined in ERISA, and that, therefore, the plaintiffs' common-law claims against Harbor and the other defendants were not pre-empted. See Appendix A attached hereto.

The defendants appealed to the Alabama Supreme Court which, on September 29, 1989, reversed all judgments entered in favor of the plaintiffs on the negligence and wantonness claims, but affirmed the judgments entered in their favor against Life & Health and Wilder on the fraud claims. *Harbor Insurance Co. v. Blackwelder*, 554 So.2d 329 (Ala. 1989). See Appendix B attached hereto. The Alabama Supreme Court opinion held that the Plan was not a governmental plan within the meaning of ERISA; that the provisions of 29 U.S.C. § 1144 pre-empted the plaintiffs' common-law claims of negligence and wantonness; but that the fraud claims did not "relate to" an employee benefit plan, and thus were not within the scope of claims pre-empted by 29 U.S.C. § 1144.

The plaintiffs filed an Application for Rehearing with the Alabama Supreme Court, which was denied without opinion on November 17, 1989. See Appendix C attached hereto.

ARGUMENT
WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

A. *Petitioners' First Question Presented Asserts Facts Not Supported By The Record*

The Petitioners' first question presented avers that the Plan "is funded primarily by state government." Harbor contends that this assertion is not supported by the record. The only evidence of any funding of the Plan to which the Petitioners' averment could relate is the 1981 resolution of the State Board of Education authorizing $309.00 per year for all full-time employees of the junior, community and technical college system, for "hospital medical insurance assistance." Some employees of 28 of the 43 schools participated in the Plan. No employees of the remaining 15 schools elected to participate. The Board resolution authorized the funds to be paid to all employees of all schools.

The opinion of the Alabama Supreme Court addressed this matter:

> "The only fact that supports the allegation that the Plan was maintained by the state is that part of the premiums paid by the participants came from funds provided by the state, to all similarly situated employees, that these employees could use to pay for part of any insurance coverage they chose. This payment, which came indirectly from the state, is not sufficient to support a conclusion that the Plan was maintained by the State." 554 So.2d 329, 333. Appendix B, p. 8.

B. *Petitioners' Second Question Presented Was Not Raised In A Timely Manner Below*

The Petitioners' second question presented seeks the Court's review of the issue of whether the Plan met ERISA's definition of "employee welfare plan" because it (allegedly) was not established or maintained by an employer or employee organization. This matter was raised for the first time when the Petitioners submitted to the Alabama Supreme Court their Brief in Support of Application for Rehearing.

In the Trial Court, the Petitioners averred in their July 1983 initial substantive pleading that "[a]t all times hereinafter mentioned Alabama Junior/Community Colleges and Technical Colleges Benefit Plan, a non-profit trust, was and is duly organized and existing 'qualified plan' as defined in Title 29 USCS Section Section 1001, et seq." [sic]. The Pretrial Order entered five days prior to the trial of this action, on July 8, 1987, included 28 numbered contentions of the Petitioners, none of which suggested that the Plan did not meet ERISA's definition of "employee welfare plan."

Appendix H sets forth copies of the Statement of Issues contained in the Brief of Appellant Harbor Insurance Company, and the Issues Presented for Review contained in the Brief of Appellee Robert E. Blackwelder, et al., presented to the Alabama Supreme Court.

The opinion of the Alabama Supreme Court states:

> "It is undisputed that the Plan involved in the present appeal is an employee benefit plan covered by the provisions of ERISA. There is a dispute, however, over whether [the governmental plan] exception to coverage applies. . . ." 554 So.2d 329, 331-32, Appendix B, p. 5.

Until the Alabama Supreme Court reversed the judgments entered against Harbor, the question of whether the Plan met ERISA's definition of "employee welfare plan" had never been raised and was not an issue in this case.

Moreover, the evidence is clear that the Presidents Insurance Committee, which established the Plan, met ERISA's definition of "employee organization" set forth in 29 U.S.C. §1002(4). See ERISA Op. Letter No. 79-62A (1979). The Plan thus met ERISA's definition of "employee welfare benefit plan" found at 29 U.S.C. §1002(1).

C. *The Opinion of the Alabama Supreme Court Does Not Conflict With The Federal Statutes, Federal Decisions or Opinion Letters of the United States Department of Labor*

The Clerk's Record of the appeal in this case contains over 3,100 pages. The Reporter's Transcript spans another 1,593 pages. The opinion of the Alabama Supreme Court begins its discussion by noting that the facts which led to this appeal are "somewhat complicated." 554 So.2d 329, 330, Appendix B, p. 2.

The Alabama Supreme Court opinion addresses each of the three reported decisions of the United States Court of Appeals and the United States District Courts which explore in detail the governmental plan exemption:

Rose v. Long Island R.R. Pension Plan, 828 F.2d 910 (2d Cir. 1987), *cert. denied*, 485 U.S. 936, 108 S.Ct. 1112, 99 L.Ed.2d 273 (1988);

Feinstein v. Lewis, 477 F.Supp. 1256 (S.D. N.Y. 1979); and

Krupp v. Lincoln University, 663 F.Supp. 289 (E.D. Pa. 1987).

In light of the holdings of those three cases, as well as various ERISA opinion letters issued by the Department of Labor, the Alabama Supreme Court concluded that "under the totality of the circumstances" and "the particular facts of the present case," the subject Plan was not a governmental plan. 554 So.2d 329, 333; Appendix B, pp. 8, 10.

In *Rose*, the Second Circuit Court of Appeals noted that ERISA was enacted in order to remedy long-standing abuses and deficiencies in the private pension system, including insufficient assets to assure payment of future benefit obligations and premature termination of underfunded benefit plans. 828 F.2d 910, 913. The *Rose* opinion also noted that governmental plans were exempted from ERISA for a number of reasons, including the ability of governmental entities to fulfill their benefit obligations to their employees through their taxing powers. 828 F.2d 910, 914. The Court observed that "LIRR employees, therefore, like other governmental employees, can depend on the State's taxing power to protect their right to retirement income." 828 F.2d 910, 918.

The Plan now before this Court had insufficient assets to assure the payment of its benefit obligations, was underfunded, and as a result became insolvent and defunct after barely one year of operation. The very deficiencies which ERISA was enacted to remedy existed in this Plan. The key advantage of true governmental plans, and the primary justification for their exemption from ERISA—public funding—was not available to this Plan.

In *Feinstein*, the employee welfare benefit plans at issue were established pursuant to collective bargaining agreements between a teacher's union and four employers, two municipalities and two public school districts. The plans were exclusively funded by contributions from the employers. The traditional governmental bodies there played a direct role in both the establishment and maintenance of the plans, and the plans were properly found to have met the ERISA

definition of governmental plan.

In *Krupp*, Lincoln University had a self-insured group health plan. The Pennsylvania legislature had enacted the Lincoln University Commonwealth Act, 24 P.S. §§ 25-10-401, *et seq.*, to establish Lincoln University as "an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education." 24 P.S. §§ 25-10-402(7). The District Court in *Krupp* noted that the Commonwealth Act was enacted to allow Pennsylvania to provide greater financial support to Lincoln University than it could under prior law. Despite these facts, the Court properly held that there was no traditional governmental entity which either established or maintained Lincoln University's employee welfare benefit plan, and that the Plan neither met ERISA's definition of governmental plan nor satisfied any of the policy reasons behind the exemption of governmental plans from ERISA's coverage.

The creators and administrators of the Plan at issue before this Court were not traditional governmental entities. They were the Presidents Insurance Committee, comprised of representatives of the Alabama Junior Colleges Presidents Association and the Alabama Technical Colleges Presidents Association, and "insurance reps" acting on behalf of the employees of the various schools. They sought neither the advice nor the approval of the State agency charged by law with the control of the junior, community and technical college system—the Alabama State Board of Education— before they established, funded, administered, and abandoned the Plan.

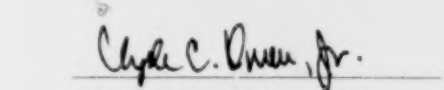
In view of the peculiar facts surrounding the creation and operation of this Plan, the Alabama Supreme Court's holding that it was not a governmental plan is entirely consistent with the holdings and rationale of *Rose, Feinstein*, and *Krupp*. This case, and those three cases, provide a harmonious discussion of what facts do, and what facts do not, demonstrate the existence of a bona fide governmental plan, exempt from the provisions of ERISA.

CONCLUSION

The Petitioners in this case were afforded every opportunity to redress their grievances. They have already secured $205,000.00 in satisfaction of their claims against the Plan Trustees, and remain free to pursue collection of the more than $2 million in judgments upheld in their favor against Life & Health and Wilder.

The opinion of the Alabama Supreme Court addressing the governmental plan issue is not contrary to, but is entirely consistent with, the opinions of the United States Court of Appeals for the Second Circuit, the United States District Courts for the Southern District of New York and the Eastern District of Pennsylvania, and with the published opinions of the United States Department of Labor. The Petition for Writ of Certiorari demonstrates neither grounds, need, nor reason for this Court to accept this case for further review.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Clyde C. Owen, Jr., a member of the Bar of the Supreme Court of the United States and attorney for the Respondent, Harbor Insurance Company, do hereby certify that on this 24th day of April, 1990, I did serve the requisite number of copies of the foregoing on the attorneys for the Petitioners and for Respondents Life & Health Services, Inc. and Betty Duncan, by mailing the same to them first-class, postage prepaid and properly addressed as follows:

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APPENDICES

APPENDICES

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APPENDIX A

(Order Entered December 30, 1987)

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. CV-83-640-G

ROBERT E. BLACKWELDER, et al.,
Plaintiffs,

vs.

ALABAMA JUNIOR/COMMUNITY COLLEGES, et al.,
Defendants.

ORDER ON PENDING MOTIONS AND JUDGMENT
ON NON JURY ISSUE

It is ORDERED, as follows:

1. All post-judgment motions filed by the defendants are, Denied.

2. The court holds that the self insurance fund at issue in this case was a governmental plan as defined by ERISA, and, as such, is specifically exempted from ERISA requirements so as not to preclude the common law causes of action. Judgment is entered in favor of the plaintiff classes and against the defendants on this issue.

DONE and ORDERED in chambers this the 30th day of December, 1987.

WILLIAM R. GORDON
CIRCUIT JUDGE

cc: Clyde C. Owen, Jr.
George L. Beck
Henry C. Barnett, Jr.
C. Knox McLaney, III
Robert S. Lamar

APPENDIX B

(Opinion Released September 29, 1989)

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1989

Harbor Insurance Company
87-391,-407

v.

Robert E. Blackwelder, et al.

Life and Health Services, Inc.
and Robert Wilder
87-487

v.

Robert E. Blackwelder, et al.

Appeals from Montgomery Circuit Court
(CV-83-640-G)

JONES, JUSTICE.

These appeals are from final judgments entered upon jury verdicts in favor of two classes of plaintiffs. The plaintiffs were all participants in an insurance plan that, due to underfunding, was unable to pay its obligations and failed. Because the plan in question is not a "governmental plan," as that term is used in the Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. § 1001 et seq.), we hold that, except for their fraud claims against Life and Health Services,

Inc. (''L&H''), and its president, Robert Wilder, the plaintiffs' common law claims are preempted by ERISA; therefore, the judgments against L&H and Wilder based on fraud are affirmed; the remaining judgments against Wilder and L&H, and the judgments against Harbor Insurance Company (''Harbor'') are reversed; and the cause is remanded for entry of judgments consistent with this opinion.

The facts that led to this appeal are somewhat complicated, but they can be summarized for the purposes of this opinion. In January 1980, Dr. William McWhorter, the president of one of Alabama's junior colleges, became interested in organizing a consolidated health insurance plan for all of Alabama's junior, community, and technical colleges.[1] He sent questionnaires to the presidents of the other schools to ascertain their interest in such a plan. Once the results were compiled, they were provided to L&H, a third-party administrator of insurance plans with which Dr. McWhorter had had periodic contact concerning the then-existing insurance plan at his college.

In the fall of 1980, a joint committee of presidents of the colleges (''the Committee'') was appointed by the Presidents' Association to study the then-existing insurance plans of the schools and to make recommendations for any changes. The Committee concluded that a self-funded insurance plan should be created; and it initially recommended a plan offered by Central Bank in association with Blue Cross, with life insurance provided by American Foundation Life Insurance Company.

The Committee again contacted L&H, this time to determine whether L&H could offer a better rate for the same coverage offered by Central Bank. Wilder undertook the task of ''selling'' the L&H plan to the Committee and, subsequently, to the individual employees. Although he knew that the plan was underfunded, based on the cal-

---

[1]The Alabama Trade School and Junior College Authority Act is codified at Ala. Code 1975, § 16-60-80 et seq.

culations and assumptions upon which it was premised, Wilder failed to disclose this fact to either the Committee or to the individual employees who chose to accept the plan.

The alternative plan proposed by L&H called for lower premiums than did the plan offered by Central Bank, and it was accepted by the Committee. This plan was reinsured by Harbor. The acceptance of the L&H plan led to the creation of the Alabama Junior/Community Colleges and Technical Colleges Employee Benefit Plan ("the Plan"). The Plan was subsequently presented to the employees of the schools and, eventually, over 1,300 employees at 28 of the schools decided to participate. The Plan collapsed after just one year of operation.

Following the collapse of the Plan, certain participants instituted several actions to recover damages from Wilder, L&H, and Harbor. After certification of the classes and consolidation of the actions, the cases proceeded to trial. The trial court ruled that the Plan was a "governmental plan" and, therefore, exempt from the provisions of ERISA. The jury returned special verdicts against Harbor on negligence claims, and against Wilder and L&H on negligence, wantonness, and fraud claims. These appeals followed.

On appeal, as at trial, the parties raise the issue of the preemptive effect of ERISA. Two threshold questions are presented: 1) Whether the Plan is one "established or maintained" by a governmental body and thus excepted from ERISA's operative effect; and 2) whether the plaintiffs' claims for fraud against Wilder and L&H fall outside the operative effect of the federal act. Because we find that the "governmental plan" exception to ERISA does not apply, we hold that the common law causes of action based upon negligence and wantonness, under which the plaintiffs recovered against all of the defendants, are preempted; thus, the judgments based on these claims are reversed. We further hold that the fraud claims against Wilder and L&H, amounting to claims for fraudulent inducement, are not preempted; thus, the judgments against these defendants on that claim are affirmed.

I

In our treatment of the "governmental plan" exception, we have undertaken a three-part analysis: 1) The first step, when examining any insurance or benefit plan, is to determine whether the plan falls within the scope of ERISA's coverage; 2) if the plan is so covered, then we must next examine the exceptions to ERISA to ascertain whether any of them apply; and, finally, 3) if we find that the plan is within ERISA's coverage, and that no exception applies, we must examine the preemptive effect of these determinations.

Our inquiry begins with the language of the statute itself. The applicable section of ERISA, governing the scope of its coverage, is found at 29 U.S.C. § 1003:

> "(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—
>
> "(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
>
> "(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
>
> "(3) by both.
>
> "(b) The provisions of this subchapter shall not apply to an employee benefit plan if (1) such plan is a governmental plan (as defined in section 1002(32) of this title). . . ."

The definitions of an "employee welfare benefit plan" and of a

"governmental plan" are found at 29 U.S.C. § 1002, which states, in relevant part:

> "(1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . .
>
> "....
>
> "(32) The term 'governmental plan' means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

It is undisputed that the Plan involved in the present appeal is an employee benefit plan covered by the provisions of ERISA.[2] There is a dispute, however, over whether an exception to coverage applies. As noted earlier, the trial court ruled that the "governmental plan" exception applied and, therefore, that ERISA did not control the determination of liability under the Plan. We disagree.

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[2]It is important to note here that while the *Plan* is covered by ERISA, a further determination is required to test ERISA's preemptive effect on the separate state law claims on which the special verdicts were based. See our later discussion of the fraud-in-the-inducement claims under part II of this opinion.

Although the "governmental plan" exception has been discussed in several cases, an analysis of the available authority leaves us without a clear, definitive standard by which we may determine whether the Plan is a governmental plan. Thus, any plan must be closely examined to determine whether it falls within this exception to the coverage of ERISA. Initially, we must bear in mind the broad scope of ERISA's preemption in the employee benefit field.

> "In determining whether various benefit policies fall within ERISA, courts should interpret the act's coverage broadly. *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983)."

Scwartz v. Newsweek, Inc., 653 F.Supp. 384,387 (S.D.N.Y. 1986), aff'd, 827 F.2d 879 (2d Cir. 1987).

One of the first cases to discuss the "governmental plan" exception was *Feinstein v. Lewis*, 477 F.Supp. 1256 (S.D.N.Y. 1979), aff'd, 622 F.2d 573 (2d Cir. 1980). In *Feinstein*, the court considered whether employee welfare plans, established as the result of a collective bargaining agreement between a union of public employees and their municipal or school district employers, were "governmental plans." The court went into a thorough discussion of the term "governmental plan" before ruling that the exception applied to the plans in question. In its analysis of the intention of Congress in enacting ERISA, the court stated:

> "These discussions clearly demonstrate that Congress, in exempting governmental plans, was concerned more with the governmental nature of public employees and public employers than with the details of how a plan was established or maintained."

Id. at 1262.

In its holding that the "governmental plan" exception applied, the *Feinstein* court emphasized that the governmental instrumentality, as the employer, provided 100% of the funding for the plans. Further, the *Feinstein* court reasoned that the mere fact that the public employers acted in conjunction with the employees' union, pursuant to a collective bargaining agreement, to establish and maintain the benefit plan, "does not lead us to the conclusion that the plan was not 'established' by the [public employers]." *Id.* at 1260.

An equally extensive discussion of the 'governmental plan' exception is found in *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910 (2d Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1112, 99 L.Ed.2d 273 (1988). The court in *Rose* ruled that a plan established by the Long Island Railroad was, under the facts of the case, a governmental plan. Of particular interest is the analysis used by the *Rose* court to define the terms "agency or instrumentality." These two terms are not defined in ERISA; but the *Rose* court reasoned that the definitions given these terms by the Internal Revenue Service, one of the agencies charged with enforcing ERISA, were entitled to great deference. The term "governmental plan" is defined at 26 U.S.C. § 414(d), and this definition is virtually identical to the one found at 29 U.S.C. § 1002(32).

> "In interpreting the § 414(d) exemption, the IRS has consistently relied on Revenue Ruling 57-128, 1957-1 C.B. 311, which lists six factors to be considered in determining whether a particular entity is an agency or instrumentality:
>
> "In cases involving the status of an organization as an instrumentality of one or more states or political subdivisions, the following factors are taken into consideration: (1) whether it is used for a governmental purpose and performs a governmental function; (2) whether performance of its function is on behalf of one or more states or

> political subdivisions; (3) whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner; (4) whether control and supervision of the organization is vested in public authority or authorities; (5) if express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and (6) the degree of financial autonomy and the sources of its operating expenses."

Rose, 828 F.2d at 918.

After an examination of these factors, as they relate to the present appeal, we find that the Plan was not established or maintained by an agency or instrumentality of the State of Alabama, or any political subdivision of it. While it could be argued that some of the six factors listed above apply to the Plan, we nonetheless conclude that, under the totality of the circumstances, the Committee was not an agency or instrumentality of the State; thus, the Plan is not a governmental plan.

Because we find that the Committee is not an agency or instrumentality of the state, we further hold that the Plan was not established or maintained by the state. The Plan was established by the independent actions of the presidents of some of Alabama's junior and technical colleges. This clearly does not meet the establishment criteria contained in the "governmental plan" exception. Neither is the Plan maintained by the state. The only fact that supports the allegation that the Plan was maintained by the state is that part of the premiums paid by the participants came from funds provided by the state, to all similarly situated employees, that these employees could use to pay for part of any insurance coverage they chose. This payment, which came directly from the state, is not sufficient to support a conclusion that the Plan was maintained by the State.

Our conclusion is further supported by the fact that the "governmental plan" exception was contemplated as a narrow exception to the otherwise expansive coverage of ERISA. In a federal case quite similar to the present one, the district court discussed the reasons behind a narrow construction of this exception:

> "Indeed, the legislative history's frequent reference to the exception simply as the 'governmental plan' exception, . . . without ever elaborating on the significance of the individual terms chosen to describe the scope of the exception, suggest that the exception was meant to cover the entire range of organizations traditionally characterized as governmental organizations, but not to expand the range to include organizations having some significant relationship with a government but not themselves viewed as governmental."

Krupp v. Lincoln University, 663 F.Supp. 289, 292 (E.D.Pa. 1987).

In *Krupp*, the court ruled that a university's health care plan was not a governmental plan, even though a legislative act had established the university as an instrumentality of the Commonwealth. The fact that the university was characterized as a "state-related institution," reasoned the *Krupp* court, did not mandate that its insurance plan be considered a governmental plan. We approve the rationale for the *Krupp* decision, and we hold that the instant Plan is not a governmental plan.

As was previously mentioned, we realize that there is no clear guide to determine when the "governmental plan" exception to ERISA applies. There have been cases involving colleges in which the insurance plan was properly found to be a governmental plan. See ERISA Op. Letter No. 77-13; and ERISA Op. Letter 76128.

However, under the particular facts of the present case, we do not find these authorities to be controlling here.[3]

Because the "governmental plan" exception does not apply to the instant Plan, the provisions of ERISA are applicable here. The preemptive provisions of ERISA are found at 29 U.S.C. § 1144:

> "Except as otherwise provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975."

In discussing this section, the United States Supreme Court has provided guidance in understanding the scope of the preemptive aspects of ERISA:

> "To summarize the pure mechanics of the provisions quoted above: If a state law 'relate[s] to . . . employee benefit plan[s],' it is pre-empted. § 514(a). The saving clause excepts from the pre-emption clause laws that 'regulat[e] insurance.' § 514(b)(2)(A). The deemer clause makes clear that a state law that 'purport[s] to regulate insurance' cannot deem an employee benefit plan to be an insurance company. § 514(b)(2)(B) [state laws that regulate insurance, banking, or securities are not preempted by ERISA].

---

[3]For a thorough discussion of the "governmental plan" exception and the cases and interpretive releases analyzing it, see RIA *Employment Coordinator*, ¶ B-10131 to B-10133, at 30, 115-118.

> "... We have observed in the past that the express preemption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' [Citations omitted.]"

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987).

II.

In regard to the state common law claims for fraud against Wilder and L&H, we hold that these claims are not preempted under the provisions of ERISA and we affirm that aspect of the trial court's judgments. In the recent case of *HealthAmerica v. Menton*, [Ms. 87-1100, July 21, 1989] _____ So.2d _____ (Ala. 1989), we held that a claim for fraud in the inducement does not "relate to" an employee benefit plan and is therefore not preempted by ERISA.

In the instant case, the plaintiffs, relying upon, among other things, Wilder's misrepresentations that the plan was "fully funded," forwent accepting the plan offered by Central Bank and accepted the L&H Plan. With their acceptance of the L&H Plan, however, the plaintiffs did not receive the promised benefits. The plaintiffs, according to their claim for misrepresentation, were not damaged as a result of the fraudulent administration of the Plan or as a result of non-payment pursuant to the Plan; rather, as a consequence of the misrepresentations and promises of benefits, they were induced to accept the L&H Plan, as opposed to a more adequately funded plan. This "fraud in the inducement" claim is not covered by the provisions of ERISA; therefore, it falls outside ERISA's preemptive effect.

The facts of the instant case fall clearly within the holding in *HealthAmerica*. L&H knew that the Committee had received from Central Bank a proposal for a plan in which the Committee had expressed an interest. In order to "sell" its proposal to the Committee and the schools' personnel, L&H had to offer a plan that was competitive with that proposed by Central Bank. The fraud committed by Wilder, on behalf of L&H (i.e., offering the Plan with knowledge that L&H's own actuarial criteria for a viable plan showed inadequate funding), was aimed at inducing the Committee and the individuals it represented to select L&H's proposal over that of its competitor. Conduct of this nature will not be tolerated in Alabama; and it was not the intent of Congress, in enacting ERISA, to preclude state regulation of such activity. See *HealthAmerica*, *supra*, and the cases cited therein.

L&H contends that the trial court erred in certifying the plaintiff classes because "commonality" and "typicality" do not exist, as required by A.R.Civ.P.23(a)(2) and (3). We disagree, and we hold that there are questions of law and fact common to the classes and that the claims of the representative parties are typical of the claims of the classes.

Although the misrepresentations were made to the members of each class at varying times, the misrepresentations were basically the same and were redressable under the same theory of recovery. Where plaintiffs allege and prove a standard claim for fraud based on misrepresentations with a common thread, as is the case here, their cause is maintainable as a class action.

It is within the sound discretion of the trial court to certify a class under Rule 23, and we will reverse such a ruling only upon a showing of an abuse of that discretion. *Marshall Durbin of Jasper, Inc. v. Jasper Utilities Board of the City of Jasper*, 437 So.2d 1014 (Ala. 1983). We have not been shown that the trial court abused its discretion in certifying the classes in the instant case.

Therefore, the judgments against Wilder and L&H, based on the non-preempted fraud claims, are affirmed; the judgments against all the defendants based on the remaining preempted state law claims are reversed; and the cause is remanded for entry of judgments consistent with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS AS TO 87-391 AND 87407.

AFFIRMED AS TO 87-487.

Hornsby, C.J., and Adams, Steagall, and Kennedy, JJ., concur.

Maddox, Almon, Shores, and Houston, JJ., concur in part and dissent in part.

MADDOX, JUSTICE (concurring in part and dissenting in part).

I concur in the portion of the majority's opinion that holds that the fraud claims are not preempted by ERISA, but because I am of the opinion that this was a "governmental plan," I would hold that none of the claims in this case are preempted, and I would affirm.

ERISA defines "governmental plan" as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." 29 U.S.C. § 1002(32). The factors listed in *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910(2d Cir. 1987), cert. denied, _____ U.S. _____ 108 S.Ct. 1112 (1988), show that the "governmental plan" exception should be interpreted broadly. In this case, the plan was for government employees and their dependents; its trustees consisted of government employees who established and maintained the plan, and it was partially funded with government money. I believe that this plan

was exempt from ERISA and that none of the plaintiffs' claims are preempted. Therefore, I must dissent from that portion of the majority's opinion holding that certain claims were preempted.

SHORES, JUSTICE (concurring in part and dissenting in part). I concur in part II of the opinion and join Justice Maddox's dissent as to Part I.

Almon, J., concurs.

HOUSTON, JUSTICE (concurring in part; dissenting in part).

See my dissent in *HealthAmerica v. Menton*, [Ms. 87-1100, July 21, 1989] _____ So.2d _____ (Ala. 1989). I would reverse and remand to permit the plaintiffs to amend their fraud cause of action to proceed with a cause of action under ERISA, 29 U.S.C. § 1132(a). Therefore, I concur in part and dissent in part.

APPENDIX C

(Notice Dated November 17, 1989)

HARBOR INSURANCE COMPANY,
LIFE & HEALTH SERVICES, INC., et al.
Appellant

v.

Robert E. Blackwelder, et al.
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Application for rehearing overruled. No opinion written on rehearing. Jones, J. Hornsby, CJ., Adams, Steagall and Kennedy, J.J., concur; Maddox, Almon, Shores and Houston, J.J., concur in part and dissent in part.

11/17/89
bsa

Robert G. Esdale, Clerk
Supreme Court of Alabama

APPENDIX D

(Motion Filed July 12, 1983)

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
Civil Action No. 83-640-G

LIFE & HEALTH INSURANCE
SERVICES, INC.,
of Alabama corporation
PETITIONER

vs.

ALABAMA JUNIOR/COMMUNITY
COLLEGES AND TECHNICAL COLLEGES
EMPLOYEE BENEFIT PLAN, etc. et. als.
RESPONDENTS

MOTION TO DISMISS

Comes now Robert E. Blackwelder, a Defendant in the above entitled cause, individually and as a proposed representative of a class of employees and claimants, and appearing specially, and without consenting to the jurisdiction of this Court, files this Motion to Dismiss, pursuant to the Alabama Rules of Civil Procedure, and assigns the following separate and several grounds:

1. This Court is without jurisdiction of the subject matter of this complaint.

2. Congress has pre-empted the field and subject matter of Employee Benefit Plans such as that described and made the subject matter of this complaint.

3. The complaint states no cause of action recognizable under state law.

4. Federal courts have exclusive subject matter jurisdiction of the matters complained of in the complaint.

5. This complaint is not brought by a participant or beneficiary to recover plan benefits or to clarify future rights and is therefore not within the concurrent jurisdiction of state courts.

Respectfully submitted,

BAXLEY, BECK & DILLARD

BY: _____

George Beck
Attorney for Blackwelder, Defendant
P.O. Box 5019
305 South Lawrence Street
Montgomery, AL 36103-5019
205/832-4878

APPENDIX E

(Motion Filed July 12, 1983)

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
Civil Action No. 83-640-G

LIFE & HEALTH INSURANCE
SERVICES, INC.,
of Alabama corporation
PETITIONER

vs.

ALABAMA JUNIOR/COMMUNITY
COLLEGES AND TECHNICAL COLLEGES
EMPLOYEE BENEFIT PLAN, etc. et. als.
RESPONDENTS

MOTION TO DISMISS

Comes now Mary R. Holley and Sarah B. Everage, Defendants in the above entitled cause, individually and as a proposed representative of a class of employees, and appearing specially, and without consenting to the jurisdiction of this Court, files this Motion to Dismiss, pursuant to the Alabama Rules of Civil Procedure, and assigns the following separate and several grounds:

1. This Court is without jurisdiction of the subject matter of this complaint.

2. Congress has pre-empted the field and subject matter of Employee Benefit Plans such as that described and made the subject matter of this complaint.

3. The complaint states no cause of action recognizable under state law.

4. Federal courts have exclusive subject matter jurisdiction of the matters complained of in the complaint.

5. This complaint is not brought by a participant or beneficiary to recover plan benefits or to clarify future rights and is therefore not within the concurrent jurisdiction of state courts.

Respectfully submitted,

BAXLEY, BECK & DILLARD

BY: _____

George Beck
Attorney for Holly & Everage, Defendants
P.O. Box 5019
305 South Lawrence Street
Montgomery, AL 36103-5019
205/832-4878

APPENDIX F

(Order Entered August 18, 1983)

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT
MONTGOMERY COUNTY, ALABAMA
CASE NO. CV-83-640-G

LIFE & HEALTH SERVICE, INC.,
Plaintiff,

vs.

ALABAMA JUNIOR/COMMUNITY
COLLEGES AND TECHNICAL COLLEGES, et al.,
Defendants.

The court having read and considered defendants' Motions to Dismiss, it is ORDERED that defendants Blackwelder, Holley, Everage, Harbor and Dill's Motions are DENIED and defendants shall file their Answers within ten (10) days from the date of this Order.

DONE and ORDERED in chambers this 18th day of August, 1983.

_____

WILLIAM R. GORDON
Circuit Judge

Robert Alton
Larry Lewiski
Thomas Dean
Kenneth Cooper
Richard Allen
John Matthews
George Beck
Robert Abrams

APPENDIX G

(Motion Filed April 22, 1987)

IN THE CIRCUIT COURT
FOR
MONTGOMERY COUNTY, ALABAMA
CIVIL ACTION NO. CV-83-640-G

Robert E. Blackwelder, et al.,
Plaintiffs,

vs.

ALABAMA JUNIOR/COMMUNITY COLLEGES,
et al.,
Defendants.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Harbor Insurance Company moves the Court to enter partial summary judgment on the claims and issues specified hereinbelow:

1. Count II of the Crossclaim of Alabama Junior/Community Colleges and Technical Colleges Employee Benefit Plan ("Plan") against Harbor, alleging negligence.

2. Count III of the Crossclaim of the Plan against Harbor, alleging fraud.

3. The issue of an agency relationship between Harbor, as principal, and Life & Health Services, Inc., and/or any of its officers, agents or employees, as agents.

4. The preemption of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001, et seq. (ERISA) of the negligence, wantonness, fraud and fraudulent concealment claims of the plaintiffs against Harbor, and the negligence, breach of contract and fraud claims of the Plan against Harbor.

5. The claim of the plaintiffs against Harbor seeking extra-contractual and punitive damages under its claim alleging liability pursuant to ERISA.

As grounds for said motion, defendant Harbor avers the following:

1. As to Counts II and III of the Plan's Crossclaim against Harbor, said claims are barred by the Statute of Limitations, and as to such matter there exists no genuine issue as to any material fact and Harbor is entitled to judgment in its favor as a matter of law.

2. As to the issue of an agency relationship between it as principal and Life & Health Services, Inc., and/or any of its officers, agents and employees, as agents, there exists no genuine issue to any material fact and Harbor is entitled to a declaration that no such agency relationship exists, as a matter of law.

3. As to the issues of the preemption of the negligence, wantonness, fraud, fraudulent concealment and breach of contract claims of the plaintiffs and the Plan, respectively, against Harbor, such issue is a question of law, and any factual disputes presented by the record do not constitute genuine issues of material facts concerning the issue of preemption.

In support of said Motion for Partial Summary Judgment, defendant Harbor offers the following:

1. The original Petition for Declaratory Judgment and Other Relief filed by Life & Health Services, Inc., to commence this proceeding.

2. The original answers, and all amendments thereto, filed by all parties to this action.

3. The Counterclaim/Crossclaim, and all amendments thereto, of the now plaintiff classes against all other parties to this action.

4. The answers and/or replies of all parties to the Counterclaim/Crossclaim of the now plaintiff classes, and all amendments thereto.

5. The Crossclaim of the Plan against Harbor.

6. Harbor's Answer to the Crossclaim of the Plan.

7. All evidence offered in support of or in opposition to any previously filed Motion for Summary Judgment, by Harbor or any other party.

8. The depositions of Robert Wilder, Judith Reif, Eugene Allen, Robert Percival, Edward Addy, Robert Markwith, and William H. McWhorter.

DEFENDANT HARBOR REQUESTS PERMISSION TO BRIEF AND PRESENT ORAL ARGUMENT RESPECTING THE MERITS OF THIS MOTION.

_____

Clyde C. Owen, Jr.
Attorney for Defendant
Harbor Insurance Company

OF COUNSEL:

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APPENDIX H

(Brief Filed April 26, 1988)

IN THE SUPREME COURT
OF ALABAMA
CASE NUMBERS: 87-391, 87-407, 87-487

HARBOR INSURANCE COMPANY and
LIFE AND HEALTH SERVICES, INC.,
Appellants,

vs.

ROBERT E. BLACKWELDER, etc., et al.,
On Appeal From The Circuit Court for Montgomery County
Appellees.

BRIEF OF APPELLANT
HARBOR INSURANCE COMPANY

Clyde C. Owen, Jr.
Gerald C. Swann, Jr.
Attorneys for Appellant
Harbor Insurance Company

OF COUNSEL:

BALL, BALL, MATTHEWS & NOVAK, P.A.
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(205) 834-7680

ORAL ARGUMENT REQUESTED

(Appellant's Brief—Alabama Supreme Court)

STATEMENT OF ISSUES

I. Whether the Governmental Plan Exemption from ERISA Applies To The Plan.

29 USC §1001(a)
29 USC §1002(32)
29 USC §1003(b)
29 USC §1144(b) (2) (B)
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. _____, 95 L.Ed.2d. 39, 107 S.Ct. 1549 (1987)
Rose v. Long Island R.R. Pension Plan, 828 F.2d 910 (2d Cir. 1987)

II. Whether the Evidence Justified Submitting the Employees' Negligence Claims Against Harbor to the Jury.

Jones v. Newton, 454 So.2d 1345 (Ala. 1984)
Sungas, Inc. v. Perry, 450 So.2d 1085 (Ala. 1984)
Hall v. Booth, 423 So.2d 184 (Ala. 1982)
Metropolitan Life Ins. Co. v. James, 238 Ala. 337, 191 So. 352 (1939)
Lazzara v. Howard A. Esser, Inc., 802 F.2d 260 (7th Cir. 1986)
§6-5-102, *Code of Alabama*, 1975
§27-8-1(c), *Code of Alabama*, 1975
§27-8-5(c), *Code of Alabama*, 1975

III. Whether the Holley Class Judgment for Mental Anguish Can Stand Absent Proof of Actual Damages.

Vincent v. Blue Cross-Blue Shield of Alabama, 373 So.2d 1054 (Ala. 1979).
Alabama Power Company v. Harmon, 483 So.2d 386 (Ala. 1986)
B&M Homes, Inc. v. Hogan, 376 So.2d 667 (Ala. 1979)
Restatement (2d) Torts, §436A

H3

(Brief Filed June 16, 1988)

IN THE SUPREME COURT
OF ALABAMA
CASE NUMBERS: 87-391, 87-407, 87-487

HARBOR INSURANCE COMPANY and
LIFE AND HEALTH SERVICES, INC.,
Appellants,

vs.

ROBERT E. BLACKWELDER, etc., et al.,
Appellees

On Appeal From The Circuit Court for Montgomery County

BRIEF OF APPELLEE ROBERT E. BLACKWELDER, ET AL.

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(Appellees' Brief—Alabama Supreme Court)

ISSUES PRESENTED FOR REVIEW

I

THE EVIDENCE MORE THAN JUSTIFIED SUBMITTING THE EMPLOYEE'S NEGLIGENCE CLAIMS AGAINST HARBOR TO THE JURY.

Hand v. Butts, 289 Ala. 653, 270 So.2d 789.

Beasley v. MacDonald Engineering Company, 287 Ala. Ala. 189, 249 So.2d844 (Ala. 1971).

Restatement of the Law, 2d Tort 2d, Section 324(a).

Fireman's Fund American Insurance Company v. Coleman, 394 So.2d 334 (Ala. 1981).

Kennedy v. City of Montgomery, 423 So.2d 187 (Ala. 1980).

Fricke v. City of Guntersville, 254 Ala. 370, 48 So.2d 420 (Ala. 1950).

Berkell and Company Contractors, Inc. v. Providence Hospital, 454 So.2d 496 (Ala. 1984).

Federal Mogul Corporation v. Universal Construction Company, 378 So.2d 716 (Ala. 1979).

McGaha v. Steadman, 410 So.2d 420 (Ala.Civ.App. 1981).

Williams v. The Jackson Company, 359 So.2d 798 (Ala.Civ.App. 1978).

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Daley v. City of Birmingham, 378 So.2d 728 (Ala. 1979).

Ziegler v. Blount Brothers Construction Company, 364 So.2d 1163, 1167 (Ala. 1978).

Harvard v. Palmer and Baker Engineers, Inc., 293 Ala. 301, 307, 302 So.2d 228, 232 (Ala. 1974).

North Carolina Mutual Life Insurance Company v. Mattie Holley, [M.S. 84-1211, 1223, Sept. 19, 1987], ___ So.2d ___ (1987).

II

WHETHER THIS WAS A GOVERNMENT PLAN

Krupp v. Lincoln University, 663 F.Supp. 289 (E.D.Pa. 1987).

Feinstein v. Lewis, 477 F.Supp. 1256 (S.D.N.Y., 1979).

Rose v. Long Island R.R. Pension Plan, 828 F.2d 910 (C.A.2, 1987).

Private Opinion Letter 79-36A, Department of Labor

Private Opinion Letter 81-82A, Department of Labor

Private Opinion Letter 83-24A, Department of Labor

Private Opinion Letter 86-24A, Department of Labor

III

WHETHER THE HOLLEY CLASS CAN RECOVER FOR MENTAL ANGUISH

Cates v. Taylor, 428 So.2d 637 (Ala. 1983).

Taylor v. Baptist Medical Center, 400 So.2d 369 (Ala. 1981).

American Road Insurance Company v. Inmon, 394 So.2d (Ala. 1980).

APPENDIX I

LIST OF AFFILIATE COMPANIES OF RESPONDENT HARBOR INSURANCE COMPANY

AFCO Agent Service Corporation
The Buckeye Union Insurance Company
Boston Old Colony Insurance Company
Casualty Insurance Company
Workers Compensation and Indemnity Company of California
First Fire and Casualty of Hawaii, Ltd.
First Indemnity Insurance of Hawaii, Inc.
The Mayflower Insurance Company, Ltd.
Niagara Fire Insurance Company
The Continental Insurance Company
AFCO Credit Corporation
Puerto Rican-American Insurance Company
Preferred Risk Insurance Company
Security National Life Insurance Company
Deutsche Continental Reinsurance, A.G.
The Hong Kong Fire Insurance Company, Ltd.
Lombard Insurance Company, Limited
Lombard General Insurance Company, Ltd.
The Continental Insurance Company (Europe), Limited
The Continental Insurance Company (U.K.), Limited
Marine Office of America (UK), Limited
Continental Reinsurance Corporation (U.K.), Limited
Unionamerica Management Company, Limited
Union American Leasing Company, Limited
Continental Risk Services, Ltd.
The CPI Group, Inc.
California Central Bank Trust Corporation
CPI Pension Services, Inc.
Settlement Options, Inc.

East River Insurance Company (Bermuda), Ltd.
Continental Reinsurance Corporation International, Limited
East River Insurance Company, Ltd.
Deutsche Continental Reinsurance, A.G.
Continental Holdings (Bermuda), Ltd.
Inter-Continental Seguradora S.A.
The Fidelity and Casualty Company of New York
CTEX, Inc.
Firemen's Insurance Company of Newark, N.J.
Commercial Insurance Company of Newark, N.J.
Continental Lloyd's Insurance Company
The Continental Insurance Company of N.J.
The Glens Falls Insurance Company
The Continental Insurance Company of Canada
The Dominion Insurance Corporation
Continental Insurance Management, Ltd.
TCC Acquisition Corporation
Continental Asset Management Corporation
Kansas City Fire and Marine Insurance Company
Marine Office of America Corporation
Associated Aviation, Inc.
Hull & Cargo Surveyors, Inc.
Global Marine Services, Ltd.
United States P&I Agency
Marine Office of America Corporation
National-Ben Franklin Insurance Company of Illinois
Bayside Reinsurance Company, Ltd.
Continental Loss Adjusting Services, Inc.
UAC Rehabilitation International, Inc.
Continental Rehabilitation Resources, Inc.
Pacific Insurance Company
Lombard Continental Insurance
Lombard Insurance Holding, Ltd.
Continental Pacific Insurance Company, Ltd.